No. 04-928

Title:	Oregon, Petitioner v. Randy Lee Guzek
Docketed:	January 7, 2005
Lower Ct:	Supreme Court of Oregon
Case Nos.:	(S45272)
Decision Date:	March 4, 2004
Rehearing Denied:	September 8, 2004

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Nov 22 2004	Application (04A444) to extend the time to file a petition for a writ of certiorari from December 7, 2004 to January 6, 2005, submitted to Justice O'Connor.
Nov 26 2004	Application (04A444) granted by Justice O'Connor extending the time to file until January 6, 2005.
Jan 5 2005	Petition for a writ of certiorari filed. (Response due February 7, 2005)
Jan 5 2005	Appendix of Oregon filed.
Jan 25 2005	Order extending time to file response to petition to and including March 9, 2005.
Mar 9 2005	Brief of respondent Randy Lee Guzek in opposition filed.
Mar 9 2005	Appendix of respondent filed.
Mar 9 2005	Motion for leave to proceed in forma pauperis filed by respondent.
Mar 23 2005	DISTRIBUTED for Conference of April 15, 2005.
Apr 1 2005	Reply of petitioner Oregon filed. (Distributed)
Apr 18 2005	DISTRIBUTED for Conference of April 22, 2005.
Apr 25 2005	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Apr 25 2005	Petition GRANTED.
Jun 3 2005	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including July 8, 2005.
Jun 23 2005	Further extension of time within which to file the joint appendix and petitioner's brief on the merits to and including July 22, 2005.
Jul 21 2005	Brief of petitioner Oregon filed.
Jul 21 2005	Joint appendix filed. (Jt.appendix in two volumes.) (Distributed)
Jul 22 2005	Brief amicus curiae of United States filed.
Jul 22 2005	Brief amici curiae of Alabama, et al. filed.
Jul 25 2005	SET FOR ARGUMENT on December 7, 2005.

Aug 5 2005	CIRCULATED.
Aug 8 2005	Extension of time within which to file respondent's brief on the merits to and including October 7, 2005.
Aug 26 2005	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Oct 7 2005	Brief of respondent Randy Lee Guzek filed. (Distributed)
Oct 11 2005	Motion to appoint counsel filed by respondent Randy Lee Guzek.
Oct 12 2005	Motion DISTRIBUTED for Conference of October 28, 2005.
Oct 31 2005	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 31 2005	Motion to appoint counsel filed by respondent GRANTED. Richard L. Wolf, Esquire, of Portland, Oregon is appointed to serve as counsel for the respondent in this case.
Nov 2 2005	Record received from Supreme Court of Oregon. (4 boxes)
Nov 14 2005	Reply of petitioner Oregon filed. (Distributed)
Nov 18 2005	Motion to dismiss the writ of certiorari as improvidently granted filed by respondent.
Nov 18 2005	Motion DISTRIBUTED for Conference of November 23, 2005.
Nov 21 2005	Petitioner's response to motion to dismiss as improvidently granted. (Distributed)
Nov 21 2005	Opposition of petitioner to respondent's motion to dismiss filed. (Distributed)
Nov 23 2005	Further consideration of respondent's motion to dismiss the writ of certiorari as improvidently granted is deferred to the hearing of the case on the merits.
Dec 7 2005	Argued. For petitioner: Mary H. Williams, Solicitor General, Salem, Ore.; and Kannon K. Shanmugam, Assistant to the the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondent: Richard L. Wolf, Portland, Ore. (Appointed by this Court.)

(1)

Supreme Court, U.S.
FILED

04-928 JAN 5 - 2005

OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

STATE OF OREGON,

Petitioner,

v.

RANDY LEE GUZEK,

Respondent.

Petition for Writ of Certiorari to the Oregon Supreme Court

PETITION FOR WRIT OF CERTIORARI

HARDY MYERS
Attorney General of Oregon
PETER SHEPHERD
Deputy Attorney General
***MARY H. WILLIAMS**
Solicitor General
400 Justice Building
Salem, Oregon 97301-4096
Phone: (503) 378-4402
Counsel for Petitioner

***Counsel of Record**

CAPITAL CASE

QUESTION PRESENTED

In *Franklin v. Lynaugh*, this Court concluded that a capital defendant does not have a constitutional right to an instruction telling the jury in the penalty phase to consider "residual doubt" about defendant's guilt. Most state and federal appellate courts have read this decision more broadly than its precise holding and have concluded that a capital defendant has no constitutional right to offer evidence and argue in a penalty-phase proceeding that he should receive a sentence less than death because he continues to assert his innocence of the underlying crime. The Oregon Supreme Court, however, held in this case that a capital defendant has a federal constitutional right to present in a penalty-phase proceeding alibi evidence that casts doubt on his guilt. The question presented is:

Does a capital defendant have a right under the Eighth and Fourteenth Amendments to the United States Constitution to offer evidence and argument in support of a residual-doubt claim—that is, that the jury in a penalty-phase proceeding should consider doubt about the defendant's guilt in deciding whether to impose the death penalty?

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PETITION FOR WRIT OF CERTIORARI

Petitioner State of Oregon respectfully prays that the Court issue a writ of certiorari to review the judgment and opinion of the Oregon Supreme Court in this case.

OPINION BELOW

The opinion of the Oregon Supreme Court (Pet. App. 1-72) is reported at 336 Or. 424, 86 P.3d 1106 (2004). The order of the Oregon Supreme Court denying reconsideration (Pet. App. 87) is not reported.

JURISDICTION

Jurisdiction to review the judgment by writ of certiorari is conferred on this Court by 28 U.S.C. § 1257(a). The Oregon Supreme Court order denying reconsideration was dated and filed on September 8, 2004. This petition is filed within the time granted by the extension of time allowed by Justice O'Connor on November 26, 2004.

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment, provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

This capital case came before the Oregon Supreme Court on automatic and direct review of a judgment that imposed a sentence of death for aggravated murder. The

Oregon Supreme Court previously affirmed defendant's conviction of two counts of aggravated murder, *State v. Guzek*, 310 Or. 299, 304, 797 P.2d 1031 (1990) (*Guzek I*), but twice vacated his sentence of death and remanded for further penalty-phase proceedings.[1]

The State conceded that error in this third penalty-phase proceeding once again required a reversal and remand for another penalty phase proceeding.[2] The Oregon

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[1] In defendant's first appeal, the Oregon Supreme Court reversed the penalty phase in light of this Court's holding in *Penry v. Lynaugh*, 492 US 302 (1989) that a penalty-phase jury must consider and answer a general mitigation question under the Eighth Amendment. *Guzek I*, 310 Or. at 305-06. In the second penalty-phase proceeding, the trial court admitted victim-impact evidence against defendant, in light of *Payne v. Tennessee*, 501 U.S. 808, *reh'g den.*, 501 U.S. 1277 (1991). On review, the Oregon Supreme Court agreed with defendant that the victim-impact evidence was not relevant to any of the questions that the jury was required to consider under the applicable state statutory scheme. The court again remanded the case for further penalty-phase proceedings. *State v. Guzek*, 322 Or. 245, 270, 906 P.2d 272 (1995) (*Guzek II*).

[2] At the time of the third penalty-phase proceeding, statutes authorized three possible sentences: life imprisonment with the possibility of release or parole ("ordinary life"), life imprisonment without the possibility of release or parole ("true life"), or death. *Former* Or. Rev. Stat. § 163.150(5)(a)(A), (B). The Oregon Supreme Court had ruled that retroactive application of the true-life sentencing option violated the state and federal prohibitions against *ex post facto* laws. *State v. Wille*, 317 Or. 487, 505, 858 P.2d 128 (1993). However, defendant sought to have the jury instructed on the

Supreme Court agreed with the State's concession, vacated defendant's death sentence and remanded for further penalty-phase proceedings. *State v. Guzek*, 336 Or. 424, 430, 86 P.3d 1106 (2004) (*Guzek III*). The court then addressed some of the remaining issues defendant had raised on appeal, which are likely to arise on remand. *Id.* Among those issues was defendant's challenge to the trial court's refusal to permit defendant to introduce certain alibi evidence to show he was not present when the crime occurred.[3]

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true-life sentencing option and waived all *ex post facto* challenges. The trial court denied the motion and did not instruct the jury regarding the true-life option. *State v. Guzek*, 336 Or. 424, 429, 86 P.3d 1106 (2004). After the conclusion of this third penalty-phase proceeding, the Oregon Supreme Court ruled that refusing to instruct a jury about the true-life sentencing option in these circumstances was reversible error. *State v. McDonnell*, 329 Or. 375, 388, 987 P.2d 486 (1999). On appeal, the State conceded that the failure to instruct the jury on the true-life sentencing option required reversal and remand for a fourth penalty-phase proceeding.

[3] Although further proceedings in the lower state courts will need to take place in this case, this Court nevertheless has jurisdiction over this federal issue because it falls within one of the categories described in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481 (1975):

> In the third category are those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. Thus, in these cases, if the party seeking interim review ul-

The two victims were murdered at their home in rural Oregon in the early morning hours of June 29, 1987.[4] Defendant sought the admission of (1) the transcript of his grandfather's testimony, admitted during the guilt phase, that defendant had been with him from 9:00 p.m. on June 28 until 2:00 a.m. on June 29, 1987; and (2) the testimony of defendant's mother that defendant had been at her home from shortly after 2:00 a.m. on the morning of June 29, 1987, and that, when she awoke at 4:20 a.m. on the same day, defendant was sleeping on a loveseat at her house. *Id.* at 450. The trial court excluded the alibi evidence, apparently on relevance grounds. Defendant

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timately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review.

No matter the outcome of the fourth penalty-phase proceeding in this case, the state will be precluded from appealing a trial court decision to admit alibi evidence and permit a residual doubt argument, as now required by the Oregon Supreme Court decision. Unless this Court considers the State's claim at this point, the State will be unable to obtain review of the Oregon Supreme Court's ruling.

[4] The Oregon Supreme Court described the murder as occurring "in the early morning hours of June 28." It would be more accurrate to describe the murder as occurring on June 29. However it is described, there is no disagreement that the evidence defendant sought to admit in the penalty phase would have demonstrated that he could not have been at the scene of the murder at the time of the murder because he was with his grandfather and then at his mother's home.

argued on appeal that the trial court erred in excluding the evidence because it was mitigating evidence relevant to the statutory question "[w]hether the defendant should receive a death sentence."[5] 336 Or. at 450-51.

The Oregon Supreme Court first considered the state legislature's intent in authorizing the admission of mitigating evidence relevant to whether the defendant should receive a death sentence. 336 Or. at 452. The court concluded that "the legislature intended to limit the admission of 'mitigating evidence' in penalty-phase proceedings so as to satisfy the Eighth Amendment." 336 Or. at 456. "Specifically, the legislature intended to ensure the admissibility of such evidence that the Eighth Amendment *requires* that a penalty-phase jury consider." *Id.* (emphasis in original). *See also* 336 Or. at 468 ("what the legislature intended to allow as 'mitigating' evidence was precisely what the United States Supreme Court would require pursuant to the federal constitution; nothing more, nothing less.") (Gillette, J., Carson, C.J. concurring in part and dissenting in part). Thus, the court unanimously concluded that the question—whether the alibi evidence in this case was properly excluded—turns on whether the Eighth Amendment, applicable to the States through the Fourteenth Amendment, requires its admission.

The court's members parted ways in resolving that federal constitutional question. A three-judge majority

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[5] Or. Rev. Stat. § 163.150(1)(b)(D) requires the jury to consider, as one of four questions necessary for the imposition of the death penalty, "[w]hether the defendant should receive a death sentence."

concluded that "the Supreme Court's Eighth Amendment jurisprudence suggests that defendant's alibi evidence is the type of evidence that a defendant is constitutionally entitled to introduce during the penalty phase for the jury's consideration." 336 Or. at 457. The two dissenting judges viewed the alibi evidence instead as "not related to any mitigating fact that informs the jury's consideration of the severity of the crime." 336 Or. at 479-80.

The disagreement in the Oregon Supreme Court centers on how the judges read this Court's Eighth Amendment case law. Both the majority and dissent take as a starting point this Court's conclusion that the Eighth Amendment requires that the sentencer "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)).

The majority acknowledged that the alibi evidence in this case differed from the type of evidence this Court has ruled is appropriate mitigating evidence. In both *Lockett* and the companion case, *Bell v. Ohio*, 438 U.S. 637 (1978), the defendant offered mitigating evidence that was consistent with the jury's guilty verdict, but demonstrated a lesser degree of culpability for the murders. The majority in this case recognized the distinction that the alibi evidence at issue here is inconsistent with defendant's convictions. *Guzek III*, 336 Or. at 461. Yet the majority found the distinction "of no consequence in

light of the Supreme Court's decision in *Green v. Georgia*, 442 U.S. 95 (1979) [(per curiam).]" *Id.*

In *Green*, this Court held that the hearsay testimony of a witness for the state in a prior, separate trial of a codefendant, regarding that codefendant's private confession that he was the actual shooter, was relevant at the sentencing phase and that its exclusion violated the Due Process Clause. The majority in this case read *Green* to hold that, "under *Lockett*, the defendant's evidence that he had not participated in the murder was a relevant circumstance of the offense that the sentencer must consider, notwithstanding that the defendant already had been convicted of the victim's murder." *Guzek III*, 336 Or. at 462. The majority concluded that the facts in this case "appear to be analogous" to the facts in *Green* and therefore determined that the Eighth Amendment requires the jury consider the alibi evidence in this case. *Id.*

The dissent disagreed with the majority's reliance on *Green* for three reasons, which they summarized as follows:

> First, I disagree with the conclusion that the defendant in *Green*, like defendant in this case, sought to introduce evidence that contradicted the jury's guilt-phase findings and would have led to an acquittal. Second, the citation to *Lockett* reflects nothing more than the Court's conclusion that the defendant sought to introduce evidence about his minor participation in the actual killing of the victim, which was precisely the type of evidence made relevant by both the plurality and concurring opinions in *Lockett*. Third, the circum-

> stances surrounding *Green* and its actual holding minimize its significance as a useful precedent for this case.

336 Or. at 471.

The dissent's own examination of this Court's Eighth Amendment jurisprudence led it to the opposite conclusion about whether that provision requires admission of residual-doubt evidence. The dissent relied primarily on *Franklin v. Lynaugh*, 487 U.S. 164 (1988), which the majority relegated to a footnote and distinguished by explaining that "a 'residual' or 'lingering doubt[]' remaining from the guilt phase, *Franklin*, 487 U.S. at 174, is qualitatively different from actual 'evidence' proffered during the penalty phase." *Guzek III*, 336 Or. at 463, n. 30. The dissent, while noting the narrow holding of *Franklin*, relied on the plurality's dicta and on Justice O'Connor's concurring opinion and concluded that the Eighth Amendment does not entitle a capital defendant to offer evidence of residual doubt at the sentencing phase. 336 Or. at 469, 476-77. The dissent summarized its understanding of *Franklin*:

> *Franklin* suggests that, just as residual doubt is not a constitutionally mandated mitigating factor that a jury must be allowed to consider, the Court also would hold that evidence intended to raise residual doubts about the defendant's guilt is not relevant to any constitutionally mandated mitigating factor. In other words, given that the Court has allowed states to bar residual doubt *arguments*, it appears to follow ineluctably that, consistent with the Eighth Amendment, the Court would allow

> states to exclude *evidence* that is relevant only because it would bolster those arguments—that is, evidence intended only to challenge the accuracy of the underlying guilty verdict.

Guzek III, 336 Or. at 477-78 (emphasis in original).

As discussed below, the dissent's view on this constitutional issue is consistent with the result reached in almost every other state and federal appellate court that has considered the issue. The majority holding leaves Oregon standing practically alone in concluding that the Eighth Amendment gives a capital defendant a constitutional right to offer evidence of innocence and argue residual doubt during a penalty-phase proceeding.

REASONS FOR GRANTING THE WRIT

A sharply divided Oregon Supreme Court held in this case that a capital defendant has a federal constitutional right to present evidence to a penalty-phase jury that is relevant only to show that the defendant did not commit the crime for which he has been found guilty. The holding creates a peculiar application of federal constitutional law when read in conjunction with *Franklin*. In Oregon, a capital defendant has a constitutional right to offer evidence in a penalty-phase proceeding that goes only to the issue of residual doubt or innocence, but has no constitutional right to have the jury instructed to consider that evidence. This Court's review is warranted to establish a uniform interpretation of whether the Eighth Amendment creates a constitutional right to offer evidence and argument in support of residual doubt in a penalty-phase proceeding.

I. Most state and federal courts have concluded that there is no constitutional requirement that residual-doubt evidence be admitted in a penalty-phase proceeding. The Oregon Supreme Court's contrary ruling creates a split on this important federal issue.

Very few appellate courts have concluded, as the Oregon Supreme Court did in this case, that a capital defendant has a right to offer evidence and argue the jury should consider doubt about his guilt as a relevant factor in determining the appropriate sentence. A majority of courts read *Franklin* overly broadly as deciding this issue contrary to the result reached by the Oregon court. Those courts that have recognized that the holding in *Franklin* is more limited have, like the dissent in this case, nevertheless determined that the reasoning leads to only one conclusion—residual doubt has no place in a penalty-phase proceeding because it is not relevant to the defendant's background or character or the circumstances of the offense. The few courts that have found a right to present a residual doubt argument have done so primarily on state-law grounds. Only two courts have reached the same conclusion as the Oregon Supreme Court based on the federal constitution.

a. The narrow holding in *Franklin* is that the constitution does not establish a right to a jury instruction on residual doubt.

As the dissent in this case properly noted, this Court has not resolved the precise issue presented here. In *Franklin*, four justices concluded that a defendant does not have a constitutional right to a jury instruction on residual doubt. 487 U.S. at 175 (White, J., Rehnquist, C.J., and Scalia and Kennedy, J.J.). The plurality did not reach the broader question—whether there is a constitutional right to offer evidence and argument in support of a lesser sentence mitigated by lingering doubts the jury may have about the defendant's guilt—because the defendant fully exercised this "right" if it existed. *Id.* at 174-75 ("In sum, even if petitioner had some constitutional right to seek jury consideration of 'residual doubts' about his guilt during his sentencing hearing—a questionable proposition—the rejection of petitioner's proffered jury instructions did not impair this 'right.'").

Two justices concurred in the judgment. They would have addressed the question presented in this case that the *Franklin* plurality did not reach. They would have rejected the defendant's "residual doubt" claim "not because the Texas scheme allowed for consideration of 'residual doubt' by the sentencing body, but rather because the Eighth Amendment does not require it." 487 U.S. at 187 (O'Connor, J., and Blackmun, J., concurring).

The *Franklin* dissent agreed with the plurality that "in this case there was no interference with any right petitioner may have had under the Eighth Amendment to have the jury consider 'residual doubt' in making its sentencing determination." 487 U.S. at 189 (Stevens, J., and Brennan and Marshall, J.J., dissenting). The holding of the Court must therefore be read on the narrow ground that garnered majority support: a defendant does not have a constitutional right to a jury instruction on residual doubt. *See Marks v. United States*, 430 U.S. 188, 193 (1977) (discussing binding effect of plurality opinions).

b. Most states have read *Franklin* more broadly to control the issue presented here and concluded, contrary to the Oregon Supreme Court, that there is no federal constitutional right to admit evidence in support of a residual-doubt argument.

In spite of the technically narrow scope of the Court's holding, most states have relied on *Franklin* for the broader proposition that a capital defendant not only has no constitutional right to have the jury instructed to consider residual doubt during the penalty phase, but also has no constitutional right to offer residual-doubt evidence or argument based on that evidence.[6] For example, the Florida Supreme Court has held that a defendant may not relitigate the guilt determination through the introduction of evidence suggesting lingering or residual doubt. *Duest v. State*, 855 S. 2d 33, 40 (Fla. 2003), *cert. denied sub nom Duest v. Florida*, ___ U.S. ___, 158 L. Ed 2d 500, 124 S. Ct. 2023 (2004). The evidence at issue in *Duest* was similar to that at issue in this case—alibi evidence offered to show that the defendant was not at the crime scene when the murder occurred. *Id. See also Darling v. State*, 808 So. 2d 145, 162 (Fla. 2002), *cert.*

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[6] It is perhaps not surprising that many courts have read *Franklin* this broadly. A year after *Franklin*, this Court described the holding as follows: "a majority agreed that 'residual doub[t]' as to Franklin's guilt was not a constitutionally mandated mitigating factor." *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*citing Franklin*, 487 U.S. at 173, and n. 6 (plurality opinion); and at 187-88 (O'Connor, J., concurring in judgment)).

denied sub nom Darling v. Florida, 537 U.S. 848 (2002) (court relied on *Franklin* in holding that a defendant has no right to present evidence of lingering doubt).

The Illinois Supreme Court also has held that a defendant has no constitutional right to argue residual doubt in a penalty-phase proceeding even when, as here, a new jury is empanelled to hear the penalty phase. *People v. Emerson*, 189 Ill. 2d 436, 502-03, 727 N.E.2d 302 (2000), *cert. denied sub nom Emerson v. Illinois*, 531 U.S. 930 (2000). Like the Florida Supreme Court, the Illinois court read *Franklin* to hold broadly "that a defendant has no right to present evidence of residual doubt at the second stage of sentencing." *Id. citing Franklin*, 487 U.S. at 172-75. *See also People v. Kirchner*, 194 Ill. 2d 502, 743 N.E.2d 94 (2000), *cert. denied sub nom Kirchner v. Illinois*, 533 U.S. 955 (2001) ("the United States Supreme Court [has] held that a defendant is not entitled to present evidence of residual doubt at the penalty phase of sentencing proceedings." *Citing Franklin*, 487 U.S. at 172-75); *People v. Terrell*, 185 Ill. 2d 467, 501, 708 N.E.2d 309 (1998), *cert. denied sub nom Terrell v. Illinois*, 528 U.S. 881 (1999) ("The *Franklin* Court contemplated procedural circumstances like defendant's, where a penalty-only proceeding is held on remand, and rejected the argument that such a defendant should be allowed to present residual doubt evidence to the new sentencing jury.").

The North Carolina Supreme Court took a similar approach, viewing *Franklin* not merely as a jury instruction case, but more broadly: "Pursuant to the ruling in *Franklin*, this Court has held that residual doubt is not properly

considered as mitigating evidence in this state." *State v. Fletcher*, 354 N.C. 455, 472, 555 S.E.2d 534 (2001), *cert. denied sub nom Fletcher v. North Carolina*, 537 U.S. 846 (2002). *Fletcher* is interesting also because the North Carolina court distinguished *Green* the same way the dissent in this case did. The North Carolina court concluded that *Green* simply did not involve residual doubt. "The excluded evidence suggesting that the defendant did not personally kill the victim was consistent with the guilty verdict in *Green* * * * and would not have prompted the jury * * * to reconsider residual doubt." *Id.* at 473.

Other states have given a similarly broad reading to *Franklin*. The Delaware Supreme Court described *Franklin* as holding that the federal constitution "in no way mandates reconsideration by capital juries, in the sentencing phase, of their 'residual doubts' over a defendant's guilt[.]" *Shelton v. State*, 744 A.2d 465, 496 (1999), *cert. denied sub nom Shelton v. Delaware*, 530 U.S. 1218 (2000) (quoting *Franklin*, 487 U.S. at 173-74). In Virginia, too, a capital defendant does not have a constitutional right to argue residual doubt in the sentencing phase. *Stockton v. Commonwealth*, 241 Va. 192, 211, 402 S.E.2d 196 (1991), *cert. denied sub nom Stockton v. Virginia*, 502 U.S. 902 (1991) (relying in part on *Franklin*). The same is true in Ohio. *State v. McGuire*, 80 Ohio St. 3d 390, 402-403, 686 N.E.2d 1112 (1997), *cert. denied sub nom McGuire v. Ohio*, 525 U.S. 831 (1998).

The Alabama Court of Criminal Appeals in *Melson v. State*, 775 So. 2d 857, 898-899 (Ala. 1999), although addressing a jury instruction question, relied on *Franklin* in

more broadly noting that "[c]apital defendants have no right to demand jury consideration of 'residual doubts' in the sentencing phase." Similarly, the Montana Supreme Court concluded that residual doubt about the defendant's guilt is not an appropriate mitigating circumstance, relying on statements in *Franklin* that "capital juries, in the sentencing phase, were not mandated to reconsider their 'residual doubts' over a defendant's guilt. Such doubts do not relate to the defendant's 'character,' 'record,' or a 'circumstance of the offense." *Gollehon v. State*, 296 Mont. 6, 13, 986 P.2d 395 (1999), *cert. denied sub nom Gollehon v. Montana*, 529 U.S. 1041 (2000).

The Texas Court of Criminal Appeals read *Franklin* as rejecting a claim that the trial court erred by preventing the jury from being able to give mitigating effect to any residual doubt about whether the defendant was guilty of the burglary during which the murder occurred. *Blue v. State*, 125 S.W.3d 491 (Tex. 2003), *cert. denied sub nom Blue v. Texas*, ___ U.S. ___, 125 S. Ct. 297, 160 L. Ed. 2d 87 (2004) (describing the *Franklin* plurality as holding that the "federal constitution does not require reconsideration by capital sentencing juries of 'residual doubts' about a defendant's guilt because such doubts do not involve a defendant's character, record or a circumstance of the offense").

c. Some states have concluded that a defendant does not have a constitutional right to raise residual doubt in the penalty phase, although the precise basis for the conclusion is unclear.

Some states have concluded that a defendant has no constitutional right to argue residual doubt, although it is

unclear whether these states view *Franklin* as controlling or merely as providing guidance. In either event, the result is the same—defendants in these states, unlike defendants in Oregon, do not have the right to present residual doubt evidence and arguement in a penalty-phase proceeding. For example, the Washington Supreme Court ruled that a defendant cannot argue residual doubt as a mitigating factor. *In re Lord*, 123 Wn. 2d 296, 868 P.2d 835 (1994), *cert. denied sub nom Lord v. Washington*, 513 U.S. 849 (1994) ("Residual doubt as to the defendant's guilt is not one of the 'relevant factors' listed in [state statute] (or the jury instructions), nor does the constitution require that it be treated as a mitigating factor.")(citing *Franklin*). The same is true for Pennsylvania. *See, e.g., Commonwealth v. Fisher*, 572 Pa. 105, 115, 813 A.2d 761 (2002) ("a capital defendant has no constitutional right to testify to his innocence at the penalty phase of trial[.]"). Similarly, the New Jersey Supreme Court has noted that, although the Eighth Amendment requires consideration of mitigating evidence of the defendant's character or record and any of the circumstances of the offense, residual doubt concerning a defendant's guilt is not relevant to any of these considerations. *State v. Josephs*, 174 N.J. 44, 803 A.2d 1074 (2002); *see also State v. Biegenwald*, 106 N.J. 13, 524 A.2d 130 (1987) (in a new capital sentencing proceeding, the defendant does not have a right to retry issues relevant only to guilt).

The Eleventh Circuit Court of Appeals relied on *Franklin* and concluded that "[t]he Constitution does not compel state courts to consider residual doubt." *Zeigler v. Florida*, 345 F.3d 1300 (2003), *cert. denied sub nom*

Zeigler v. Crosby, ___ U.S. ___, 125 S. Ct. 280, 160 L. Ed. 2d 67 (2004). Similarly, the Fourth Circuit Court of Appeals has commented that "'Residual doubts' at the penalty stage of a capital trial * * * are constitutionally insignificant." *Evans v. Thompson*, 881 F.2d 117, 121 (1989), *cert. denied* 497 U.S. 1010 (1990).

d. At least one court permits argument about residual doubt, but does not find a federal constitutional right to introduce evidence or have a jury instructed on the issue.

The Mississippi Supreme Court appears to have reached a result that lies somewhere between the ruling of the Oregon Supreme Court in this case and the contrary holdings discussed above. *Holland v. Mississippi*, 705 So. 2d 307 (Miss. 1997), *cert. denied* 525 U.S. 829 (1998). As in this case, *Holland* involved a capital defendant whose conviction had previously been upheld, but whose case was remanded for a new sentencing proceeding. *Id.*, 705 So. 2d at 319. In the new sentencing proceeding, the defendant sought to introduce evidence to show he was not guilty of the crimes for which his conviction had been upheld. *Id.* The Mississippi Supreme Court rejected the defendant's argument that such evidence was constitutionally required, holding instead that the "Court's prior affirmance of guilt precludes any residual or whimsical doubt as to the validity of Holland's conviction." *Id.* at 326. The court based its holding, in part, on its reading of *Franklin*, which it construed as holding "that defendants have no constitutional right to reconsideration of residual doubt on sentencing" because "such a right would be inconsistent with penalty-only tri-

als, such as resentencings, which are not themselves violative of the Eighth Amendment." *Id.* at 325-26 (citing *Franklin*, 487 U.S. at 173 n. 6 and 174). The court made a distinction between residual-doubt argument, which it permits, and "the submission of jury instruction or evidence on residual doubt" which it deemed impermissible. *Holland*, 705 So. 2d at 326. Because the evidence the defendant offered, as in this case, was "nothing more than an attack upon the prior finding of guilty by the first jury, which was affirmed by this [c]ourt," the Mississippi Supreme Court concluded that the defendant was not entitled to present evidence or have a jury instruction on residual doubt. *Id.* at 327.

e. Some states have found a state-law basis for a residual-doubt claim.

States concluding that a defendant has a right to argue residual doubt in the penalty phase have generally based that conclusion on state law, not on the federal constitution. For example, the California Supreme Court, while recognizing no federal or state law right to a jury instruction on residual doubt, found a state statutory right to present evidence and argue residual doubt. *People v. Musselwhite*, 17 Cal. 4th 1216, 1272-73, 74 Cal. Rptr. 2d 212, 247 (1998), *cert. denied sub nom Musselwhite v. California*, 525 U.S. 1073 (1999). The Tennessee Supreme Court similarly found a state law right for a defendant to present evidence at a resentencing hearing to establish residual doubt. *State v. Holton*, 126 S.W.3d 845, 861 (2004), *cert. denied sub nom Holton v. Tennessee*, ___ U.S. ___, 125 S. Ct. 62, 160 L. Ed. 2d 22 (2004) (under Tennessee law, a defendant has the right to present at the sentencing hearing evidence which may mitigate his culpability); *see also State v. Hartman*, 42 S.W.3d 44, 55 (Tenn. 2001).[7]

The Supreme Court of Georgia has construed state statutes as giving considerable leeway to defendants to present mitigating evidence in a penalty-phase proceeding. *Height v. State*, ___ Ga. ___, ___ S.E.2d ___, 2004 Ga. LEXIS 958 (Nov 8, 2004). In an earlier ruling, the court noted that *Lockett* and *Eddings* give "[c]onstitutional tenure" to its holding that the state statute permits consideration in sentencing of guilt or innocence. *Blankenship v. State*, 251 Ga. 621, 624, 308 S.E.2d 369 (1983). *See also Romine v. State*, 256 Ga. 521, 350 S.E.2d 446 (1986), *cert. denied sub nom Romine v. Georgia*, 481 U.S. 1024 (1987) ("evidence relating to guilt or innocence is relevant to sentence" and is especially important where the case is being retried only in a new penalty phase).

f. Only two courts appear to have reached a result similar to that of the Oregon Supreme Court.

The only state court other than Oregon to have found a federal constitutional right to submit evidence and argue residual doubt in a sentencing proceeding did so

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[7] Like many of the other states, the Tennessee Supreme Court reads *Franklin* broadly. *See Hartman*, 42 S.W.3d at 55 ("The United States Supreme Court has held that there is no constitutional right to have residual doubt considered as a mitigating factor in a capital sentencing hearing.") (citing *Franklin*, 487 U.S. at 174).

prior to the issuance of *Franklin*. In 1986, the South Carolina Supreme Court determined, relying on *Eddings* and *Lockett*, that the Eighth Amendment requires a defendant be permitted to introduce evidence of innocence in a penalty-phase proceeding. *State v. Stewart*, 288 S.C. 232, 341 S.E.2d 789 (1986). The court called that holding into question in *dicta* in *State v. Southerland*, 316 S.C. 377, 447 S.E.2d 862 (1994), *cert. denied sub nom Southerland v. South Carolina*, 513 U.S. 1166 (1995), *overruled on other grounds, State v. Chapman*, 317 S.C. 302, 454 S.E 2d 317 (1995) (although the trial court denied defense counsel's request to argue residual doubt, counsel without objection nevertheless made the argument; but the court notes that "residual doubts are not a mitigating factor in sentencing," citing *Franklin*).

If the South Carolina Supreme Court has, in fact, reached the conclusion that there is no federal constitutional right to argue residual doubt, only the Fifth Circuit Court of Appeals is in agreement with the Oregon Supreme Court on this issue. The Fifth Circuit concluded that there is a constitutional right to present evidence and argument in support of residual doubt, even if there is no right to a jury instruction. *Smith v. Black*, 904 F.2d 950 (5th Cir. 1990), *cert. granted and judgment vacated on other grounds*, 503 U.S. 930 (1992).

II. The Oregon Supreme Court's decision provides the Court with an opportunity to clarify whether, under the Eighth Amendment, residual-doubt evidence must be admitted in penalty-phase proceedings.

In this case, a majority of the Oregon Supreme Court read this Court's Eighth Amendment case law to require that a capital defendant must be permitted to offer, in a new penalty-phase proceeding, alibi evidence that casts doubt on his guilt. As the dissent below properly noted, this result is inconsistent with the analysis that led this Court to conclude in *Franklin* that a defendant does not have a constitutional right to a jury instruction on residual doubt. Although they have not always been clear on the scope of the *Franklin* holding, most other courts that have addressed this issue have reached the same conclusion as the dissent in this case.

This case thus presents the Court with the opportunity to clarify a question that now divides the courts. It is important to resolve this conflict so that the Eighth Amendment is not construed to provide different constitutional rights to capital defendants depending on where they reside. The Oregon Supreme Court's ruling opens the door to relitigation of defendant's guilt in the penalty-phase proceeding. If the jury finds defendant's alibi evidence persuasive, it creates more than simply residual doubt as a mitigating factor to consider in choosing the appropriate sentence, but may call into question the validity of the conviction itself. As the Ohio Supreme Court stated,

> Our system requires that the prosecution prove all elements of a crime beyond a reasonable doubt. Therefore, it is illogical to find that the defendant is guilty beyond a reasonable doubt, yet then doubt the certainty of the guilty verdict by recommending mercy in case a mistake has occurred. * * * Residual doubt casts a shadow over the reliability and credibility of our legal system in that it allows the jury to second-guess its verdict of guilt in the separate penalty phase of a murder trial.

McGuire, 80 Ohio St. at 403 (citation omitted). The states have a strong interest in finality of criminal convictions as well as an interest in reducing the significant costs that may be associated with relitigating questions of guilt and innocence in a penalty-phase proceeding.

In addition, as this Court noted in *Franklin*, finding a constitutional right to raise residual doubt before the penalty-phase jury "is arguably inconsistent with the common practice of allowing penalty-only trials on remand of cases where a death sentence—but not the underlying conviction—is struck down on appeal." *Franklin*, 487 U.S. at 173 n. 6 (plurality opinion). Yet this Court itself has suggested the limited remand for a new penalty-phase proceeding only and state courts frequently allow this kind of remand. The Oregon Supreme Court's holding casts some doubt on the permissibility of these stand-alone penalty-phase proceedings.

CONCLUSION

For the reasons discussed above, the State respectfully requests that this Court grant the petition for writ of

certiorari and reverse the decision of the Oregon Supreme Court below.

Respectfully submitted,

HARDY MYERS
Attorney General of Oregon
PETER SHEPHERD
Deputy Attorney General
MARY H. WILLIAMS
Solicitor General
Counsel for Petitioner

January 6, 2005

(2)

Supreme Court, U.S.
FILED

04-928 JAN 5 - 2005

OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

STATE OF OREGON,

Petitioner,

v.

RANDY LEE GUZEK,

Respondent.

Petition for Writ of Certiorari to the Oregon Supreme Court

APPENDIX

HARDY MYERS
Attorney General of Oregon
PETER SHEPHERD
Deputy Attorney General
***MARY H. WILLIAMS**
Solicitor General
400 Justice Building
Salem, Oregon 97301-4096
Phone: (503) 378-4402
Counsel for Petitioner

***Counsel of Record**

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IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,

Plaintiff on Review,

v.

RANDY LEE GUZEK,

Defendant on Review.

(CC 87-CR-0373-TM; SC S45272)

86 P3d 1106

Background: Following defendant's conviction on two counts of aggravated murder and imposition of death sentence, and following two vacations of sentence by the Supreme Court and remands for resentencing, 310 Or 299, 797 P2d 1031; 322 Or 245, 906 P2d 272, the Circuit Court, Deschutes County, Pierre Van Rysselberghe, J., resentenced defendant to death.

Holdings: On automatic and direct review, the Supreme Court, Riggs, J., held that: (1) trial court's refusal to give instruction on true-life sentencing option was reversible error; (2) on remand, retroactive application of amendments to death penalty statute allowing admission of "any aggravating evidence" would violate *ex post facto* prohibition; (3) victim-impact evidence would be admissible in penalty retrial under state constitutional provision allowing victims a right to be heard; (4) defendant's evidence of coperpetrators' prior inconsistent statements was admissible for nonhearsay purpose of impeaching their guilt-trial testimony; and (5) defendant's proffered alibi evidence was admissible at penalty trial.

Vacated and remanded

Durham, J., filed a concurring opinion.

Gillette, J., filed a concurring and dissenting opinion, in which Carson, C.J., joined.

1. Constitutional Law — Due Process of Law — Criminal Prosecutions — Judgment and Sentence — In General

The Eighth Amendment is applicable to the states through the Fourteenth Amendment. US Const, Amends VIII, XIV.

2. Sentencing and Punishment — The Death Penalty — Proceedings — Determination and Disposition — Review of Proceedings to Impose Death Sentence — Harmless and Reversible Error.

In penalty trial of capital murder prosecution, trial court's failure to instruct jury on "true life" sentencing option (life without possibility of parole), which was not a sentencing option when defendant committed offenses, and instead instructing only on death and "ordinary life" (life with possibility of parole), was reversible error, where defendant requested true life instruction, thereby waiving *ex post facto* prosecutions. US Const, Art I, § 10, cl 1; Or Const, Art I, § 21; ORS 138.012(2)(a)(A), (B), 163.150(5)(a)(A), B (1997).

3. Sentencing and Punishment — The Death Penalty — Proceedings — Evidence — Burden of Proof.

In capital prosecutions, question whether the defendant should receive a death sentence is not subject to any burden of proof. ORS 163.150(1)(b)(D).

4. Constitution — Retrospective and Ex Post Facto Laws — Retroactive Operation of Ex Post Facto Laws — Nature or Extent of punishment — Sentencing and Punishment — The Death Penalty — In General — Retroactive Operation — Validity of Particular Retroactive Applications.

Retroactive application of amendments to death penalty statute, allowing admission of "any aggravating evidence" in penalty trial, to defendant whose offenses predated amendments, was precluded as violating *ex post facto* prohibition; at time of offenses, prosecution was limited to aggravating evidence relevant to three questions specified in statute, and amendment effected one-sided change that made imposition of death sentence more likely. Or Const, Art I, § 21; ORS 163.150(1)(a), (c)(B).

5. Sentencing and Punishment — The Death Penalty — Proceedings — Evidence — Admissibility — Victim Impact.

Victim-impact evidence was admissible, under state constitutional provision allowing victims a right to be heard, in capital penalty trial of defendant whose offenses predated amendments to death penalty statute that allowed victim-impact evidence; by its terms, victims' right provision superseded any *ex post facto* concerns. Or Const, Art I, §§ 21, 42; ORS 163.150(1)(a), (c)(B).

6. Sentencing and Punishment — The Death Penalty — Proceedings — Evidence — Admissibility — Victim Impact.

Relatives of murder victims were "victims" under state constitutional provision allowing victims a right to be heard, and thus relatives were entitled to testify in penalty trial of capital murder prosecution as to relevant evidence of murder victims' personal characteristics and impact of the crime upon murder victims' family. Or Const, Art I, § 42; ORS 163.150(a).

7. Constitutional Law — Retrospective and Ex Post Facto Laws — Retroactive Operation of Ex Post Facto Laws — Retroactive Operation of Ex Post Facto Laws — Nature or Extent of Punishment — Sentencing and Punishment — The Death Penalty — Proceedings — Evidence — Admissibility — Victim Impact.

Admission of victim-impact evidence in capital penalty trial, under statutory amendments allowing such evidence, to defendant whose offenses predated amendments did not violate federal *ex post facto* prohibition; evidence did not lower state's quantum of proof necessary to obtain death penalty, and any tipping of balance in favor of state was not unfair. US Const, Art I, § 10, cl 1; ORS 163.150(a).

8. Witnesses — Credibility and Impeachment — Inconsistent Statements by Witness — Witnesses Who May Be Impeached by Inconsistent Statements — Impeachment of Testimony of Deceased or Absent Witness.

In penalty trial of capital murder prosecution, in which the state introduced transcripts of guilt-trial testimony of defendant's coperpetrators, who refused to testify at penalty trial, to prove elements of state's death penalty case, coperpetrators' prior inconsistent statements, offered by defendant, were admissible for non-hearsay impeachment purpose. ORS 138.012(2)(b).

9. Sentencing and Punishment — The Death Penalty — Proceedings — Evidence — Admissibility — In General

In penalty trial of capital murder prosecution, alibi evidence consisting of trial transcript of testimony of defendant's grandfather was admissible; like transcript of any other witness's testimony, it was relevant and subject to consideration in the penalty trial, regardless of its substance. ORS 138.012(2)(b), 163.150(1)(a).

10. Sentencing and Punishment — The Death Penalty — Proceedings — Evidence — Admissibility — Evidence in Mitigation in General.

In penalty trial of capital murder prosecution, defendant's alibi evidence was admissible, even though evidence contradicted guilt-trial convictions for aggravated murder; evidence was highly relevant to a critical issue in the penalty trial, and thus evidence qualified as "mitigat-

ing evidence" under death penalty statutory scheme. US Const, Amend VIII; ORS 163.150(1)(a), (b)(D), (c)(B).

11. Sentencing and Punishment — The Death Penalty — Proceedings Evidence — Admissibility — Evidence in Mitigation in General.

Under Eighth Amendment, a court must allow a capital defendant to present at sentencing, and a sentencer must be able to consider, any evidence relevant to any circumstances of the offense that mitigates against imposition of the death penalty. US Const, Amend VIII.

On automatic and direct review of the sentence of death imposed by the Deschutes County Circuit Court.

Pierre Van Rysselberghe, Judge.

J. Kevin Hunt, Oregon City, argued the cause for defendant on review. With him on the brief was Eric M. Cumfer, Salem.

Rolf C. Moan, Assistant Attorney General, Salem, argued the cause for plaintiff on review. With him on the briefs were Hardy Myers, Attorney General, Michael D. Reynolds, Solicitor General, and Robert B. Rocklin and Holly A. Vance, Assistant Attorneys General.

Before Carson, Chief Justice, and Gillette, Durham, Riggs, and De Muniz, Justices.*

RIGGS, J.

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* Leeson, J., resigned January 31, 2003, and did not participate in the decision of this case. Balmer and Kistler, JJ., did not participate in the consideration or decision of this case.

The sentence of death is vacated, and the case is remanded to the circuit court for further proceedings.

Durham, J., concurred and filed an opinion.

Gillette, J., concurred in part and dissented in part and filed an opinion, in which Carson, C. J., joined.

RIGGS, J.

This case is before us on automatic and direct review of a judgment that imposed a sentence of death for aggravated murder. *Former* ORS 163.150(1)(g) (1997), *repealed by* Or Laws 1999, ch 1055, § 1.[1] This court previously affirmed defendant's conviction of two counts of aggravated murder, *State v. Guzek*, 310 Or 299, 304, 797 P2d 1031 (1990) (*Guzek I*), but twice vacated his sentence of death and remanded for further penalty-phase proceedings, as discussed below. On this third review, the state concedes — and we agree — that the trial court erred in failing to instruct the jury on the "true-life" sentencing option and that this court again must vacate the sentence of death. Accordingly, as discussed further below, we vacate the sentence of death and remand to the trial court for further proceedings. In the discussion that follows, we also address issues of law that are likely to arise on retrial, if the state again pursues a death sentence. *See, e.g.*, *State v. Smith*, 310 Or 1, 21-22, 791 P2d 836 (1990) (court addressing issues likely to arise on remand despite already having determined that remand was necessary).

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[1] This court's authority to review sentences of death now is found in ORS 138.012(1).

I. FACTS

The following facts are taken from this court's opinion in *Guzek I*, 310 Or at 301-02, and from the record from defendant's third penalty-phase proceeding. The victims, Rod and Lois Houser, knew defendant because he had been a high school acquaintance of their niece, who lived with them in rural Deschutes County. Defendant and the niece had dated. After the niece ended their relationship, defendant acted with hostility toward her — in her words, "stalk[ing]" her — prompting Rod Houser to warn defendant away from the Housers' home.

In June 1987, defendant and two associates planned to burglarize a particular residence and kill its occupant. When the three men arrived at that residence, however, they were thwarted by the presence of too many people. One of defendant's associates suggested that they target the Housers' home instead. The three men then went to defendant's home, obtained a rifle and a pistol, and went to the Housers' home with the intention of killing the Housers and stealing their property.

When Rod Houser answered defendant's knock at the door, one of defendant's associates, at defendant's prompting, shot Rod Houser repeatedly, killing him. Defendant then found and shot Lois Houser three times, killing her. The three men then ransacked the home and stole a great deal of personal property. The Housers' niece was not at home at the time.

The Housers' two daughters went to their parents' home two days later, worried because they had not been able to reach their parents by telephone. The daughters discovered their parents' bodies inside the ransacked

home. Later, the daughters saw and identified their parents' belongings in defendant's possession. As noted, defendant ultimately was convicted of two counts of aggravated murder and sentenced to death.

II. PROCEDURAL HISTORY

1. Beginning with defendant's first appeal, we describe the procedural history of this case in some detail, because that history provides important background information for much of the discussion that follows. First, we note that, after defendant's first penalty-phase trial, in an unrelated case on remand from the United States Supreme Court, this court concluded that the Eighth Amendment to the United States Constitution[2] requires that a penalty-phase jury consider and answer a general mitigation question, to ensure that the jury has the opportunity to give effect to any mitigating evidence relevant "outside or beyond" particular statutory issues submitted to the jury. *State v. Wagner*, 309 Or 5, 13, 786 P2d 93, *cert den*, 498 US 879 (1990) (*Wagner II*). Because the court in defendant's case had not submitted a general mitigation question to the jury, this court vacated defendant's sentence and remanded the case for a new penalty-phase proceeding. *Guzek I*, 310 Or at 305-06.

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[2] The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*." (Emphasis added.) The Eighth Amendment is applicable to the states through the Fourteenth Amendment. *See Robinson v. California*, 370 US 660, 667, 82 S Ct 1417, 8 L Ed 2d 758, *reh'g den*, 371 US 905 (1962) (so demonstrating).

The next year, another decision of the United States Supreme Court again affected defendant's penalty-phase proceedings. According to the interpretation of the Eighth Amendment in effect at the time of defendant's crimes, the introduction of "victim-impact" evidence in the penalty phase of a capital trial constituted cruel and unusual punishment under the Eighth Amendment. *See Booth v. Maryland*, 482 US 496, 509, 107 S Ct 2529, 96 L Ed 2d 440, *reh'g den*, 483 US 1056 (1987) (so holding). However, in 1991, the Supreme Court overruled *Booth* in part, concluding that that decision had "deprive[d] the State of the full moral force of its evidence" in a death-penalty case. *Payne v. Tennessee*, 501 US 808, 825, 111 S Ct 2597, 115 L Ed 2d 720, *reh'g den*, 501 US 1277 (1991).[3] The Supreme Court held in *Payne* that the Eighth Amendment did not erect a *per se* bar to victim-impact evidence. *Id.* at 827. In the wake of *Payne*, the state offered, and the trial court admitted, victim-impact evidence against defendant in his second penalty-phase proceeding. Defendant again received a sentence of death.

On review of that second death sentence, defendant argued that the victim-impact evidence that the state had introduced against him was not relevant to any of the questions that the jury was required to consider under the

[3] The Supreme Court noted in *Payne* that that case did not involve evidence of the family's opinions about the crime and about the appropriate sentence. 501 US at 830 n 2. Accordingly, the holding in *Booth* that that type of evidence constituted cruel and unusual punishment may remain valid after *Payne*.

applicable death-penalty statutory scheme, ORS 163.150(1)(b) (1989).[4] This court agreed and remanded the case for further proceedings. *State v. Guzek*, 322 Or 245, 270, 906 P2d 272 (1995) (*Guzek II*).

After a third penalty-phase proceeding, defendant again was sentenced to death. That sentence is before us now.

III. TRUE-LIFE SENTENCING OPTION

2. We turn to the reason for which, as the state concedes, we must vacate defendant's sentence of death.

Defendant's third penalty-phase proceeding began in 1997. The statutes then in effect required the trial court, after this court's remand in *Guzek II* for further penalty-phase proceedings, to sentence defendant to life imprisonment or, at the state's election, to empanel a jury for a new penalty-phase proceeding to determine if defendant should be sentenced to death, to life imprisonment without the possibility of release or parole ("true life"), or to life imprisonment with the possibility of release or parole ("ordinary life"). *Former* ORS 163.150(5)(a)(A), (B) (1997), *renumbered as* ORS 138.012(2)(a)(A), (B) (1999). However, the constitutional protections against *ex post facto* laws contained in Article I, section 21, of the Oregon Constitution and Article I, section 10, of the

[4] In accordance with the statutory framework in place at that time, the trial court asked a general mitigation question in compliance with *Wagner II*. We discuss both the original and current versions of that question, set out at ORS 163.150(1)(b)(D), later in this opinion. *See* 336 Or at 452-54.

United States Constitution[5] prohibited the retroactive application of the true-life sentencing option to defendant's case, because that option did not exist at the time when defendant committed his crimes. *See State v. Wille*, 317 Or 487, 505, 858 P2d 128 (1993) (retroactive imposition of true-life sentencing option, over the defendant's objection, violates state and federal *ex post facto* prohibitions).

In his third penalty-phase proceeding, defendant moved to have the trial court instruct the jury on the true-life sentencing option. To that end, he expressly waived all *ex post facto* guarantees that otherwise would have protected him from retroactive application of the true-life option. The trial court denied defendant's motion and did not instruct the jury regarding true life.

After a jury again sentenced defendant to death, this court explained that a criminal defendant may waive protection from *ex post facto* laws, including the protection against the application of a later-enacted version of the death-penalty statutory scheme. *State v. McDonnell*, 329 Or 375, 388, 987 P2d 486 (1999). This court reiterated those principles in *State v. Langley*, 331 Or 430, 439, 16 P3d 489 (2000). Accordingly, as the state recognizes, the trial court's decision not to instruct the jury regarding the true-life sentencing option was reversible error. We

[5] Article I, section 21, of the Oregon Constitution provides, in part, that "[n]o *ex-post facto* law * * * shall ever be passed * * *." Article I, section 10, of the United States Constitution provides, in part, that "[n]o State shall * * * pass any * * * ex post facto Law * * *."

therefore must vacate defendant's sentence of death and remand for further proceedings.

IV. ISSUES LIKELY TO ARISE ON REMAND

Defendant raises other issues on review. Below, we address some of those issues, which are likely to arise on remand. Specifically, we address (1) the admissibility of "any aggravating evidence" and victim-impact evidence against defendant pursuant to the current versions of ORS 163.150(1)(a) and (c)(B),[6] in light of defendant's state and federal protections against *ex post facto* laws; and (2) the admissibility of certain evidence that the trial court excluded during defendant's third penalty-phase proceeding that defendant again might offer in a subsequent penalty-phase proceeding.

A. *Admission of "Any Aggravating Evidence" and Victim-Impact Evidence*

At the time of defendant's crimes in 1987, ORS 163.150(1)(a) (1985) required that any evidence introduced in a penalty-phase proceeding must be "relevant to sentence." *Former* ORS 163.150(2) (1985), *renumbered as* ORS 163.150(1)(b)(A) - (C)(1987), in turn, set out three statutory questions for the jury's consideration:

> "(a) Whether the conduct of the defendant that caused the death of the deceased was committed

[6] Those statutory provisions will govern defendant's penalty-phase proceeding on remand. *See* ORS 138.012(2)(b) (ORS 163.150(1) to (3) and (5) govern new penalty-phase proceeding after remand).

deliberately and with the reasonable expectation that death of the deceased or another would result;

"(b) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society * * *; and

"(c) If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased."[7]

The state was required to prove affirmative answers to those questions beyond a reasonable doubt. *See former* ORS 163.150(3) (1985), *renumbered as* ORS 163.150(1)(d) (1989) (so providing). Further, defendant also was permitted to introduce general mitigating evidence that militated against imposition of the death penalty. *See Wagner II*, 309 Or at 14 (mitigating evidence beyond scope of three statutory issues admissible under pre-1989 version of ORS 163.150(1)(a)).

3. Before defendant's second penalty-phase proceeding, the 1989 Legislative Assembly enacted a "fourth question," set out at ORS 163.150(1)(b)(D), encompassing general mitigating evidence that a defendant previously might have proffered under the reasoning set out in *Wagner II*, 309 Or at 14. *See* 336 Or at 453 (slip op at 42) (setting out ORS 163.150(1)(b)(D) (1989)). The 1991

[7] The current version of ORS 163.150(1)(b)(A) to (C) is virtually identical to the part of *former* ORS 163.150(2)(a) to (c) (1985) that is quoted in the text above.

Legislative Assembly subsequently amended that question, still in effect today, to ask a penalty-phase jury "[w]hether the defendant should receive a death sentence." ORS 163.150(1)(b)(D); Or Laws 1991, ch 885, § 2. That fourth question, unlike the first three statutory questions set out in ORS 163.150(1)(b)(A) to (C), is not subject to any burden of proof. *See, e.g.*, *State v. Fanus*, 336 Or 63, 70, 79 P3d 847 (2003) (because fourth question frames discretionary determination for jury, it imposes no burden of proof).[8]

Before defendant's third penalty-phase proceeding, the 1995 Legislative Assembly amended the death-penalty statutory scheme expressly to permit the introduction of relevant "aggravating" evidence and victim-impact evidence, adding the following text to ORS 163.150(1)(a):

"In the [penalty-phase] proceeding, evidence may be presented as to any matter that the court deems relevant to sentence *including, but not limited to, victim impact evidence relating to the personal characteristics of the victim or the impact of the crime on the victim's family and any aggravating*

[8] As this court recently noted in *Fanus*, 336 Or at 66 n 4, the jury considers the third question set out in ORS 163.150(1)(b)(C), regarding victim provocation, only when that question is relevant under the facts at hand. In defendant's third penalty-phase proceeding that third statutory question was not relevant, and the trial court therefore submitted only three questions — the first, second, and fourth questions under ORS 163.150(1)(b) — to the jury.

> *or mitigating evidence relevant to the issue in paragraph (b)(D) of this subsection*[.]"[9]

Or Laws 1995, ch 531, § 2 (emphasis added). The reference to "paragraph (b)(D) of this subsection" pertained to the fourth statutory question for the jury, discussed above.

Two years later, the 1997 Legislative Assembly incorporated the 1995 amendment to ORS 163.150(1)(a) into the jury instruction on the fourth question, by adding the following text to ORS 163.150(1)(c)(B):

> "The court shall instruct the jury to answer the question in paragraph (b)(D) of this subsection 'no' if, after considering *any aggravating evidence and any mitigating evidence* concerning any aspect of the defendant's character or background, or any circumstances of the offense *and any victim impact evidence as described in subsection (1)(a) of this section*, one or more of the jurors believe that the defendant should not receive a death sentence."

Or Laws 1997, ch 784, § 1 (emphasis added).

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[9] That text remains in the current version of the statute. At the time of defendant's crimes in 1987, that part of ORS 163.150(1)(a) provided as follows:

> "In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence[.]"

ORS 163.150(1)(a) (1985).

In his third penalty-phase proceeding, defendant argued that retroactive application of the foregoing 1995 and 1997 amendments to ORS 163.150(1)(a) and (c)(B) violated the prohibitions against *ex post facto* laws contained in Article I, section 21, of the Oregon Constitution and Article I, section 10, of the United States Constitution. The trial court disagreed, and the state thereafter introduced evidence, discussed further below, falling within the parameters of the amendments.

In any subsequent penalty-phase proceeding, the state is likely to offer the same or similar aggravating and victim-evidence against defendant, and defendant is likely to make the same objections. Accordingly, we address those objections here, beginning with defendant's state constitutional challenge to retroactive application of the "any aggravating evidence" provisions of the 1995 and 1997 amendments. *See, e.g.*, *State v. Montez*, 324 Or 343, 363, 927 P2d 64 (1996), *cert den*, 520 US 1233 (1997) (addressing defendant's state constitutional argument before addressing his federal constitutional argument).

1. *Retroactive Application of "Any Aggravating Evidence" Provisions of ORS 163.150(1)(a) and (c)(B) to Defendant's Remanded Penalty-Phase Proceeding*

4. As noted, at the time of his crimes in 1987, defendant was permitted under ORS 163.150(1)(a) (1985) to introduce general mitigating evidence that militated against imposition of the death penalty. *Wagner II*, 309 Or at 14. Further, in *Guzek II*, this court concluded that, in enacting the 1989 version of ORS 163.150(1)(b)(D) (that is,

the original "fourth question"), the legislature intended to submit to the jury the question "whether any *mitigating* circumstances exist that would justify a sentence of life rather than death." 322 Or at 263 (emphasis in original). By contrast, after the 1995 and 1997 amendments to ORS 163.150(1)(a) and (c)(B), the death-penalty statutory scheme now allows admission of "any aggravating evidence" under the fourth question.

Defendant argues that the 1995 and 1997 amendments to ORS 163.150(1)(a) and (c)(B) fundamentally altered the nature of the fourth question, by allowing the state to introduce new and different evidence than it was permitted to introduce at the time when defendant committed his crimes. Thus, defendant argues, retroactive application of the later-enacted amendments to his penalty-phase proceedings violates the *ex post facto* prohibition set out in Article I, section 21, *see* 336 Or at 429 n 5 (setting out provision), which this court recently analyzed in *State v. Fugate*, 332 Or 195, 210-15, 26 P3d 802 (2001).

The state responds, first, that the *ex post facto* prohibition of Article I, section 21, applies to only those changes in the rules of evidence that make *conviction* more likely. Therefore, the state contends, that prohibition does not apply to changes in the law concerning the admissibility of evidence in penalty-phase proceedings, because such proceedings are *sentencing* proceedings only. Alternatively, the state argues that the 1995 and 1997 amendments to ORS 163.150(1)(a) and (c)(B) did not expand the range of aggravating evidence that could have been admitted in a penalty-phase proceeding at the

time of defendant's crimes in 1987. It follows, the state argues, that retroactive application of the amendments to defendant's remanded penalty-phase proceeding does not amount to a state *ex post facto* violation.

We begin with the discussion of Article I, section 21, that this court offered in *Fugate*. In that case, this court reiterated that Article I, section 21, prohibits the application of the types of laws that the framers of the Oregon Constitution understood to be prohibited by the *Ex Post Facto* Clause of the United States Constitution. 332 Or at 214. Those laws fall into the four categories that Justice Chase identified in his opinion in *Calder v. Bull*, 3 US (3 Dall) 386, 390-91, 1 L Ed 648 (1798), quoted in *Fugate*, 332 Or at 212:

> "'I will state what laws I consider *ex post facto* laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. *4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender.* All these and similar laws are manifestly unjust and oppressive.'"

(Emphasis in *Fugate*.) In *Fugate*, this court explicitly held what it had implied in an earlier decision, *State v.*

Cookman, 324 Or 19, 31, 920 P2d 1086 (1996), namely, that Article I, section 21, prohibited laws that fit within the "fourth category" of *Calder*, that is, "laws that alter the rules of evidence in a one-sided way that makes conviction of the defendant more likely." *Fugate*, 332 Or at 213.

As noted above, the state first seeks to distinguish the "any aggravating evidence" provisions of the 1995 and 1997 amendments to ORS 163.150(1)(a) and (c)(B) from those laws that belong in *Calder*'s "fourth category" by emphasizing that the death-penalty statutory scheme describes a proceeding for "sentencing," not "convicting," a defendant. Although we agree that penalty-phase proceedings are "sentencing" proceedings, we disagree that identifying them in that way exempts them from the prohibition described in *Calder*'s fourth category, as explained below.

First, we note that the categories described in *Calder* are general ones, used to summarize the types of *ex post facto* laws that the federal constitutional provision then prohibited. Justice Chase made that clear in his opinion by stating that the laws described in those categories and "[*a*]*ll* * * * *similar laws* are manifestly unjust and oppressive." 3 US (3 Dall) at 390-91 (emphasis added). The question before us, then, is whether a change in the rules of evidence applicable to a penalty-phase proceeding that permits "different testimony than the law required at the time of the commission of the offen[s]e," *id.* at 390, to sentence a defendant to death is sufficiently similar to the laws described in *Calder*'s fourth category to proscribe

the application of that change in the law on *ex post facto* grounds.

We turn to the proceedings under ORS 163.150. Although those proceedings concern what sentence a court must impose, they are otherwise similar to a criminal trial that results in a conviction. For example, the state is required to prove its case under the first three statutory questions set out in ORS 163.150(1)(b)(A) to (C) beyond a reasonable doubt. *See* ORS 163.150(1)(d) (so stating). The decision whether the defendant may be sentenced to death is made by the jury, ORS 163.150(1)(a), and it must be unanimous, ORS 163.150(1)(e). Moreover, by contrast to other sentencing proceedings, the Oregon Evidence Code applies. OEC 101(4)(d).[10] In our view, those characteristics of a penalty-phase proceeding make it sufficiently similar to an ordinary trial, and its outcome sufficiently similar to a "conviction," to consider changes in the rules of evidence that apply in such proceedings the same, for purposes of an *ex post facto* analysis, as changes in the rules of evidence that apply in guilt-phase proceedings of other kinds of trials.[11] Therefore, when a

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[10] That rule provides that the Oregon Evidence Code does not apply in sentencing proceedings, "except proceedings under ORS 138.012 and 163.150," concerning death-penalty proceedings, "or as required by ORS 137.090," concerning proceedings to determine circumstances in aggravation or mitigation of punishment in other criminal cases.

[11] The United States Supreme Court also has recognized that penalty-phase proceedings in capital trials are analogous to guilt-phase proceedings for the purpose of analyzing constitutional protections that must be afforded the accused. *See,*

change in the law alters the rules of evidence in a one-sided way that makes a sentence of death more likely than it would have been at the time that a defendant committed aggravated murder, application of that law to the defendant offends the *ex post facto* prohibition of Article I, section 21, as explained in *Fugate*.

Turning to the 1995 and 1997 amendments to ORS 163.150(1)(a) and (c)(B) that provided for admission of "any aggravating evidence," we agree with defendant that they amounted to "one-sided" changes, *Fugate*, 332 Or at 213, that made a sentence of death more likely than it would have been before the changes. As noted above, at the time of defendant's crimes, the state's only express statutory avenue for introducing evidence against a defendant during a penalty-phase proceeding was in relation to the first three questions now set out at ORS 163.150(1)(b)(A) to (C). Specifically, the

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e.g., *Strickland v. Washington*, 466 US 668, 686-87, 104 S Ct 2052, 80 L Ed 2d 674, *reh'g den*, 467 US 1267 (1984) (concluding that capital sentencing proceedings under Florida law were indistinguishable from ordinary trial for purposes of right to counsel, because they were "sufficiently like a trial in [their] adversarial format and in the existence of standards for decision"). As the Court noted in its opinion in *Monge v. California*, 524 US 721, 731-32, 118 S Ct 2246, 141 L Ed 2d 615 (1998):

> "The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder."

state could introduce evidence that was relevant to only the questions whether a defendant's conduct had been committed deliberately and with the reasonable expectation that death would result; whether a probability existed that the defendant would commit violent criminal acts constituting a continuing threat to society; and whether the defendant's conduct had been unreasonable in response to any provocation by the victim. Further, the state's evidence on the first three statutory questions was (and still is) subject to a burden of proof, in that the state was required to prove affirmative answers to those questions beyond a reasonable doubt. The defendant, by contrast, was permitted to introduce general mitigating evidence, subject to no burden of proof requirement, that supported imposition of a sentence other than death.

After the 1995 and 1997 amendments to ORS 163.150(1)(a) and (c)(B), the state now has an *additional* express statutory avenue to introduce evidence *against* a defendant, because it now may introduce "any aggravating evidence" that is not relevant to the first three statutory questions and that pertains to a statutory question that is not subject to any burden of proof. That amounts to a "one-sided" change that benefits only the state and, effectively, makes a sentence of death more likely than it would have been before the change. Therefore, Article I, section 21, prohibits retroactive application of the "any aggravating evidence" provisions of ORS 163.150(1)(a) and (c)(B) to defendant on remand, as discussed in *Fugate*.

The state nonetheless argues that, because it was permitted at the time of defendant's crimes in 1987 to

introduce a broad range of aggravating evidence under the first three statutory questions, "it is difficult to hypothesize [any] aggravating evidence that, while admissible [under the amendment to ORS 163.150(1)(a)] in 1995, would not have been admissible in 1987." The state continues that the scope of its aggravating evidence at the time of defendant's crimes went beyond the first three statutory questions because the state permissibly could have introduced aggravating evidence to controvert any mitigating evidence that defendant offered in his behalf. Finally, the state emphasizes that, under the 1995 amendment to ORS 163.150(1)(a), any evidence offered in aggravation still must be "relevant to sentence." In the state's view, given the broad scope of its potential evidence at the time of defendant's crimes in 1987, coupled with the continued requirement that its evidence be relevant to the sentencing determination, it is highly unlikely that any *relevant* aggravating evidence against defendant would have been subject to exclusion in 1987.

Although we agree with the state that, at the time of defendant's crimes in 1987, it was permitted to introduce a broad range of aggravating evidence, we disagree that the 1995 and 1997 amendments essentially effected no change to the state's ability to introduce aggravating evidence against defendant at a remanded penalty-phase proceeding. As explained above, the state now may introduce "any aggravating evidence" that is not relevant to the first three statutory questions and that pertains to a statutory question that is not subject to any burden of proof; further, such evidence is not limited to rebutting any particular mitigating evidence offered by a defendant. Stated differently, the 1995 and 1997 amendments

had the effect of removing two limitations on the state's evidence that heretofore ran in a defendant's favor, that is, the requirements that all evidence introduced against the defendant (and therefore supporting imposition of the death penalty) would (1) be limited in its relevance either to the first three statutory questions or to rebut any particular mitigating evidence that the defendant proffered; and (2) respecting the first three statutory questions, ultimately implicate the highest possible burden of proof. Such a change in the law undoubtedly qualifies as a "one-sided" change that makes imposition of a sentence of death more likely, retroactive application of which would contravene Article I, section 21.

In sum, we conclude that, in defendant's remanded penalty-phase proceeding, the trial court is precluded from retroactively applying the "any aggravating evidence" provisions of the 1995 and 1997 amendments to ORS 163.150(1)(a) and (c)(B). Any determination of the relevance of the state's aggravating evidence against defendant therefore must be in relation to the first three statutory questions set out in ORS 163.150(1)(b)(A) to (C) or in relation to rebuttal of any particular mitigating evidence offered by defendant.[12]

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[12] In the "preservation" section of his assignment of error challenging retroactive application of the "any aggravating evidence" provisions of the 1995 and 1997 amendments ORS 163.150(1)(a) and (c)(B), defendant refers to general evidence of "misconduct" on his part, including evidence of an act of perjury, that the state successfully introduced at his third penalty-phase proceeding over his objection, apparently to establish that defendant had exhibited a pattern of antiso-

2. *Retroactive Application of Victim-Impact Evidence Provisions of ORS 163.150(1)(a) and (c)(B) to Defendant's Remanded Penalty-Phase Proceeding*

As discussed above, in addition to adding a provision allowing for "any aggravating evidence," the 1995 amendment to ORS 163.150(1)(a) also provided for the admission of "victim impact evidence relating to the personal characteristics of the victim or the impact of the crime on the victim's family." *See* 336 Or at 432 (quoting Or Laws 1995, ch 531, § 2). The 1997 amendment to ORS 163.150(1)(c)(B) similarly required that the jury consider, as part of its consideration of the fourth question, "any victim impact evidence as described in subsection (1)(a) of this section." *See* 336 Or at 432 (quoting Or Laws 1997, ch 784, § 1).

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cial behavior. Defendant does not elaborate on the particular evidence that, in his view, the state introduced under the current "any aggravating evidence" provisions.

We acknowledge the possibility that the evidence that defendant points to in his brief might have been admissible as evidence of "future dangerousness" under the second statutory question set out in ORS 163.150(1)(b)(B). As we have clarified in the text above, on remand, the trial court must determine if such evidence is relevant and, therefore, generally admissible under ORS 163.150(1)(b)(B) (or under the other statutory questions on which the state bears the burden of proof), or whether the evidence qualifies solely as "any aggravating evidence" not relevant to the first three questions and not rebutting any particular mitigating evidence offered by defendant.

In defendant's third penalty-phase proceeding, the state introduced evidence of the victims' personal characteristics and of the impact that their murders had on their two daughters, on their niece and nephew, and on Rod Houser's brother. Defendant objected to the state's victim-impact evidence, arguing that, like the "any aggravating evidence" provisions of the 1995 and 1997 amendments to ORS 163.150(1)(a) and (c)(B), retroactive application of the victim-impact evidence provisions violated the state and federal constitutional prohibitions against *ex post facto* laws. The trial court disagreed, and the jury considered the evidence. On review, defendant renews both his state and federal challenges, which we discuss in turn below.

a. *Oregon Constitution*

5. As defendant points out, under the 1989 version of the death-penalty statutory scheme in place at the time of his second penalty-phase proceeding (and, indisputably, under the 1985 version of that statute in place at the time of his crimes in 1987), the admission of victim-impact evidence constituted reversible error. *Guzek II*, 322 Or at 270. Defendant argues that, accordingly, the victim-impact evidence provisions of the 1995 and 1997 amendments to ORS 163.150(1)(a) and (c)(B) constituted "one-sided" changes in the law that now allow the state to introduce different evidence than it was permitted to introduce at the time when defendant committed his crimes. As with his challenge to the "any aggravating evidence" provision, defendant argues that retroactive application of those provisions violates the *ex post facto* prohibition of Article I, section 21, under *Fugate*.

The state counters that the state constitutional *ex post facto* prohibition does not proscribe retroactive application of the victim-impact evidence provisions of the 1995 and 1997 amendments to ORS 163.150(1)(a) and (c)(B) because those changes in the law were not "one-sided." That is so, the state argues, because a defendant also "conceivably could benefit from the introduction of victim-impact evidence." Alternatively, the state argues that, even if Article I, section 21, formerly proscribed the admission of victim-impact evidence against defendant, that proscription will not apply on remand because it has been superseded by Article I, section 42, of the Oregon Constitution, which, among other things, confers on victims the "right * * * to be heard" at sentencing in criminal proceedings.

We need not resolve the parties' dispute as to whether retroactive application of the victim-impact evidence provisions of the 1995 and 1997 amendments to ORS 163.150(1)(a) and (c)(B) would violate the state constitutional prohibition against *ex post facto* laws. As explained below, even if defendant's state *ex post facto* analysis were correct, we agree with the state that a victim's "right * * * to be heard" under Article I, section 42(1)(a), of the Oregon Constitution supersedes any Article I, section 21, protection applicable to defendant, as explained below.

The voters adopted what is now Article I, section 42, of the Oregon Constitution as a legislatively referred constitutional amendment in 1999. Among other things, that amendment provided that crime victims have "[t]he right * * * to be heard at * * * the sentencing * * * dis-

position[.]" Or Const, Art I, § 42(1)(a). The amendment further provided that the rights set out therein applied to all criminal proceedings "pending or commenced on or after" the effective date of the amendment, that is, December 2, 1999. Or Const, Art I, § 42(2).

The state's argument that, on remand, Article I, section 42(1)(a) will require admission of relevant victim-impact evidence against defendant presents a two-part question. First, we must determine whether the state's offering of the type of victim-impact evidence that the 1995 amendment to ORS 163.150(1)(a) describes, that is, evidence "relating to the personal characteristics of the victim or the impact of the crime on the victim's family," qualifies as a victim's "right * * * to be heard" under Article I, section 42(1)(a). Because we conclude that it does, and because, by its terms, Article I, section 42, will apply to any subsequent penalty-phase proceeding in this case, we must address a second question: Whether the victims' right to be heard requires the trial court on remand to admit relevant victim-impact evidence against defendant despite any protection against *ex post facto* laws that Article I, section 21, might afford him.

We begin with the text of Article I, section 42. *See Shilo Inn v. Multnomah County*, 333 Or 101, 116-17, 36 P3d 954 (2001), *modified on recons on other grounds*, 334 Or 11, 45 P3d 107 (2002) (when interpreting referred constitutional provision, court's task is to discern intent of voters; best evidence of voters' intent is text of provision). It provides, in part:

> "(1) To preserve and protect the right of crime victims to justice, to ensure crime victims a mean-

ingful role in the criminal and juvenile justice systems, to accord crime victims due dignity and respect and to ensure that criminal and juvenile court delinquency proceedings are conducted to seek the truth as to the defendant's innocence or guilt, and also to ensure that a fair balance is struck between the rights of crime victims and the rights of criminal defendants in the course and conduct of criminal and juvenile court delinquency proceedings, *the following rights are hereby granted to victims in all prosecutions for crimes* and in juvenile court delinquency proceedings:

"(a) *The right* to be present at and, upon specific request, to be informed in advance of any critical stage of the proceedings held in open court when the defendant will be present, and *to be heard at* the pretrial release hearing and *the sentencing* or juvenile court delinquency *disposition*;

"* * * * *

"(2) *This section applies to all criminal* and juvenile court delinquency *proceedings pending or commenced on or after the effective date of this section*. Nothing in this section reduces a criminal defendant's rights under the Constitution of the United States. *Except as otherwise specifically provided, this section supersedes any conflicting section of this Constitution.* * * *

"(3) As used in this section:

"* * * * *

"(c) 'Victim' means any person determined by the prosecuting attorney to have suffered direct financial, psychological or physical harm as a result of a crime and, in the case of a victim who is a minor, the legal guardian of the minor. In the event that no person has been determined to be a victim of the crime, the people of Oregon, represented by the prosecuting attorney, are considered to be the victims. * * *"

(Emphasis added.)

6. The text of Article I, section 42, permits us to answer the first question quickly. Article I, section 42(1)(a), confers the "right * * * to be heard" on those persons that the state deems to have suffered harm as a result of a crime (defined in section (3)(c) as "[v]ictim[s]"). We need not consider the full breadth of that right to conclude that it generally encompasses the more narrowly defined victim-impact evidence mentioned in the 1995 amendment to ORS 163.150(1)(a) and, relatedly, in the 1997 amendment to ORS 163.150(1)(c)(B). The right of a murder victim's family member (who also can qualify as a "victim" under Article I, section 42) "to be heard" in a penalty-phase proceeding means, at a minimum, the right to offer relevant evidence of the murder victim's personal characteristics and of the impact of the crime upon the murder victim's family. In the context of a capital penalty-phase proceeding, the state's ability to offer victim-impact evidence under ORS 163.150(1)(a) ordinarily will serve as the mechanism for the exercise of that right.

Because, as noted above, Article I, section 42, "applies to all criminal * * * proceedings pending or commenced on or after" December 2, 1999, it follows that the Housers' family members will have the right in any subsequent penalty-phase proceeding in this case to offer evidence of the Housers' personal characteristics and of the impact of the crimes on their family. That conclusion conflicts with defendant's contention that Article I, section 21, insulates him from the introduction of victim-impact evidence through its prohibition against *ex post facto* laws. Accordingly, assuming, without deciding, that defendant is correct respecting the applicability of Article I, section 21, we must determine which "right" will govern the question of the admissibility of victim-impact evidence in any further proceeding in this case: the victims' right to be heard or defendant's right to be free from application of an *ex post facto* law. To answer that question, we again turn to the text of the Article I, section 42.

Article I, section 42(2), provides, in part:

> "Nothing in this section reduces a criminal defendant's rights under the Constitution of the United States. Except as otherwise specifically provided, this section supersedes any conflicting section of this Constitution."

By providing that Article I, section 42, does not "reduce[]" a defendant's federal constitutional rights and that it supersedes any conflicting section of the Oregon Constitution, that text anticipates that the victim's right to be heard might be incompatible with a criminal defendant's constitutional right in a particular case. At the

same time, the text establishes that the voters intended the anticipated conflict to be resolved in one of two ways, depending on the source of the criminal defendant's conflicting right.

According to the first of the two sentences quoted above, the voters made clear that they did not intend to attempt to change any right previously guaranteed to a criminal defendant under the United States Constitution. Accordingly, in the event of a conflict between a victim's right to be heard and a criminal defendant's *federal* constitutional right, it is the victim's right to be heard that must give way.[13] By contrast to that deference to federal constitutional law, Article I, section 42, provides that it will supersede any conflicting section of the Oregon Constitution. Read in context, that statement makes clear that, in the event of a conflict between a victim's right to be heard under Article I, section 42(1)(a), and a criminal defendant's right under the *Oregon* Constitution, it is the victim's right that has constitutional priority.

Applying the foregoing understanding of Article I, section 42, to this case, we conclude the following. In a subsequent death-penalty proceeding in this case, the

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[13] What we emphasize here is that the victim's right to be heard must give way as a matter of Oregon constitutional law, because Article I, section 42(2), of the Oregon Constitution specifically provides for a criminal defendant's federal constitutional rights not to be "reduce[d]" if in conflict with the victim's right to be heard. It is of no consequence to our discussion that the victim's right to be heard must give way in such circumstances as a matter of *federal* constitutional law, regardless of the wording of Article I, section 42.

Housers' family members will have the right under Article I, section 42(1)(a), to offer relevant victim-impact evidence as described in the 1995 amendment to ORS 163.150(1)(a) and later included in the 1997 amendment to ORS 163.150(1)(c)(B). Although retroactive application of those amendments to defendant might implicate the *ex post facto* prohibition under Article I, section 21, defendant's right to be free from retroactive application of the amendments is superseded in this context by the right conferred on the Housers' family members under Article I, section 42(1)(a).

b. *United States Constitution*

7. Defendant also argues that retroactive application of the victim-impact evidence provisions of the 1995 and 1997 amendments to ORS 163.150(1)(a) and (c)(B) to his remanded penalty-phase proceeding violates the prohibition of *ex post facto* laws set out in Article I, section 10, of the United States Constitution. *See* 336 Or at 429 n 5 (setting out provision). The state counters that, according to the analysis that the United States Supreme Court set out in *Carmell v. Texas*, 529 US 513, 120 S Ct 1620, 146 L Ed 2d 577 (2000), it does not. For the reasons set out below, we agree with the state's *ex post facto* analysis under federal law.

When interpreting the prohibition against *ex post facto* laws set out in Article I, section 10, of the United States Constitution, the Supreme Court relies on *Calder*'s categories. The Court, like this one, has held that alterations to the rules of evidence in a manner that makes conviction more likely fall into the fourth category of laws under *Calder* that violate *ex post facto* principles.

Carmell, 529 US at 522-25.[14] However, the Court has offered a specific interpretation, as a matter of federal constitutional law, of the kind of change in the rules of evidence that facilitates an easier conviction. Under Article I, section 10, as the Court explained in *Carmell*, a change in the rules of evidence that facilitates an easier conviction — like changes in the law relating to *Calder*'s first three categories — is one that "subverts the pre-

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[14] The Supreme Court in *Carmell* also recognized that Justice Chase had set out alternative wording of the four categories of *ex post facto* laws identified in *Calder*. As to the fourth category, Justice Chase's alternative wording provided:

> "[Ex post facto laws] violated the rules of evidence, to supply a deficiency of legal proof, by admitting one witness, when the existing law required two; by receiving evidence without oath; or the oath of the wife against the husband; or other testimony which the courts of justice would not admit."

Carmell, 529 US at 522 n 9 (quoting *Calder*, 3 US (Dall) at 389).

In *Stogner v. California*, ___ US ___, 123 S Ct 2446, 2452, 156 L Ed 2d 544 (2003), the Supreme Court quoted *Calder*'s alternative wording with approval in determining that a retroactive statute of limitations extension likely would fall into the fourth category. *See also id.* at 2450-52 (applying alternative wording of second category to invalidate extended statute of limitations at issue); and 2458 (citing *Carmell* for proposition that *Calder*'s alternative descriptions remain viable).

sumption of innocence."[15] *Id.* at 532. Specifically, the evidentiary change must be one that alters the sufficiency-of-evidence standard or otherwise "reduc[es] the quantum of evidence necessary to meet the burden of proof" to convict. *Id.* at 532-33. Applying that standard to a penalty-phase proceeding, we construe it as a standard that focuses on whether the change in the law lowers the minimum quantum of evidence required to obtain a sentence of death.

With that standard in mind, we again turn to the 1995 and 1997 amendments to ORS 163.150(1)(a) and (c)(B) that permit the admission of victim-impact evidence. We agree with the state that nothing about those amendments lowers the quantum of proof necessary for the state to obtain a sentence of death. The state must prove each issue submitted to the jury under ORS 163.150(1)(b)(A) to

[15] In *Fugate*, this court specifically rejected that interpretation insofar as the Oregon Constitution is concerned. 332 Or at 213. As noted in *Fugate*, this court's inquiry under Article I, section 21, concerns the understanding of the *ex post facto* prohibition that the framers of the Oregon Constitution had in mind. That understanding was influenced by *Calder* and by the interpretation of *Calder* that had been offered in 1822 by the Indiana Supreme Court in interpreting Article I, section 24, of the Indiana Constitution, on which Article I, section 21, of the Oregon Constitution is based. 332 Or at 211. The United States Supreme Court's inquiry, by contrast, concerns the understanding of the *ex post facto* prohibition offered in *Calder* as further interpreted by the Court in its decisions over the course of two hundred years. *See Carmell*, 529 US at 525 (citing Court's decisions from 1867 through 1997 that relied on *Calder*'s fourth category).

(C) beyond a reasonable doubt, ORS 163.150(1)(d), just as Oregon law previously required it to do. Although the retroactive application of a change in the law that permits the state to introduce a new kind of evidence against a defendant might tip the balance in favor of the state, it does not "unfair[ly]" tip it, *Carmell*, 529 US at 533 n 23, for purposes of the federal *Ex Post Facto* Clause, as does a change in the law that reduces the sufficiency of the evidence standard. That distinction is dispositive. As the Supreme Court explained in *Carmell*, not every rule that increases the state's likelihood of success on the merits constitutes an *ex post facto* law under Article I, section 10. For example, the Court observed that rules that permit evidence to be admitted at trial, whether one-sided or not,

> "* * * do not at all subvert the presumption of innocence, because they do not concern whether the admissible evidence is sufficient to overcome the presumption. Therefore, to the extent one may consider changes to such laws as 'unfair' or 'unjust,' they do not implicate the same *kind* of unfairness implicated by changes in rules setting forth a sufficiency of the evidence standard."

Id. (emphasis in original). Accordingly, the admission of victim-impact evidence against defendant under the 1995 and 1997 amendments to ORS 163.150(1)(a) and (c)(B) does not violate the *Ex Post Facto* Clause of the United States Constitution.

B. *Exclusion of Evidence Offered to Impeach Testimony of State Witnesses Wilson and Cathey*

8. We turn to defendant's assignments of error concerning the trial court's decision to exclude evidence that defendant offered to impeach the transcript testimony of state witnesses Wilson and Cathey.

Wilson and Cathey were codefendants of defendant Guzek. The three men had gone to the Housers' home together. Wilson had shot Rod Houser at defendant's prompting, and Cathey had stabbed Rod Houser in an effort to make the murder appear to have been a "cult killing." Both Wilson and Cathey entered into plea agreements. They pleaded guilty to aggravated murder, agreed to cooperate in the prosecution of defendant, and received sentences of life imprisonment.

Wilson and Cathey testified against defendant during the guilt phase of defendant's first trial. They described their actions before the murders, including the preparations that they had made and their intent to kill the Housers. They described what had happened once they had arrived at the Housers' home, including the instructions that defendant had given them. They also described what had happened after the murders, including defendant's payment to them for their participation.

The state sought to call Wilson and Cathey as witnesses against defendant in his second penalty-phase proceeding, but they refused to testify. The state again sought to call them during this third penalty-phase proceeding. Wilson and Cathey again refused. Cathey appeared in court and stated, without explanation, that he refused to testify. Wilson appeared by telephone and

stated that, on the advice of counsel in connection with his federal habeas corpus proceedings, he was invoking his right under the Fifth Amendment not to testify. The trial court determined that Cathey and Wilson were unavailable as witnesses, as described in Rule 804(1) of the Oregon Evidence Code, and it permitted the state to introduce the transcripts of their prior testimony.[16]

Defendant sought to refute Wilson's and Cathey's transcript testimony by offering evidence that tended to contradict that testimony, including evidence of inconsistent statements by the witnesses themselves. For example, defendant made an offer of proof that he would call as a witness a lawyer who had worked on defendant's second penalty-phase trial and to whom Cathey had stated in 1991 that Cathey, Wilson, and defendant had had no intention to kill the Housers before arriving at their home. That lawyer also would have testified that Cathey had told her that defendant had not directed Wilson to shoot Rod Houser. Defendant further made an offer of proof that he would have called as a witness an investigator to whom Wilson had stated in 1997 that there had been no "leader" among the codefendants and that they had not had any plan to kill the Housers. The trial court sustained the state's objections to admission of the foregoing evidence.[17] On review, defendant argues,

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[16] Defendant assigns error on review to the trial court's admission of the Wilson and Cathey transcripts. We conclude that the trial court properly admitted those transcripts, and we decline to address defendant's argument further here.

[17] The trial court had several reasons for excluding the evidence at issue. We do not address each of those reasons;

among other things, that his proffered evidence refuting Wilson's and Cathey's transcript testimony did not qualify as hearsay was relevant for impeachment purposes.

At the outset, we offer an important point of clarification. Under ORS 138.012(2)(b), after remand for a new penalty-phase proceeding, the guilt-phase proceeding transcripts are admissible in the new penalty-phase proceeding. For that reason alone, Wilson's and Cathey's transcript testimony from the guilt phase of defendant's first trial was admissible in defendant's third penalty-phase proceeding. However, the state did not offer the transcripts only because they were transcripts from the guilt-phase proceeding. Instead, the state relied on Wilson's and Cathey's transcript testimony, in lieu of their live testimony, also to prove two elements of the state's case in the *penalty-phase proceeding*, namely, that defendant had acted deliberately within the meaning of ORS 163.150(1)(b)(A) and that a probability existed that defendant would commit violent criminal acts in the future, thus posing a continuing threat to society within the meaning of ORS 163.150(1)(b)(B). In other words, even though Wilson's and Cathey's transcript testimony introduced during the penalty-phase proceeding consisted of their testimony from the guilt phase, the state put that testimony to an additional use in the penalty phase, specifically, to prove that defendant should receive a sentence of death. That is significant, because it demonstrates that the state made the credibility of Wilson and Cathey relevant to the *penalty-phase proceeding* and

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instead, we limit our discussion to the parties' arguments respecting the admissibility of that evidence.

opened the door for defendant's impeachment of their testimony. *See State v. Johanesen*, 319 Or 128, 135-37, 873 P2d 1065 (1994) (discussing relevance of extrinsic evidence for impeaching credibility of witness).

That said, we turn to the state's argument that the trial court properly excluded defendant's proffered impeachment evidence refuting Wilson's and Cathey's transcript testimony because that evidence qualified as hearsay, not within any exception. The state asserts that defendant "does not appear to dispute [the] proposition" that his proffered evidence was hearsay. We disagree. Defendant does not concede that he offered his evidence refuting Wilson's and Cathey's transcript testimony only to prove the truth of the matter asserted therein. *See* OEC 801(3) ("'Hearsay' is a statement, other than one made by the declarant while testifying * * *, offered in evidence to prove the truth of the matter asserted."). Instead, defendant argues that his proffered evidence of inconsistent statements by Wilson and Cathey was "very powerful" impeachment evidence, in other words, that it tended to show that the jury should not trust Wilson's and Cathey's transcript testimony about defendant's role in the murders. Because defendant offered his evidence for that purpose, it did not qualify as hearsay, and the trial court erred by excluding it on that basis.[18] *See Blue Ribbon*

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[18] Of course, defendant's evidence of inconsistent statements by Wilson and Cathey also had a *possible* hearsay purpose: To prove that defendant had not intended to kill the Housers before he had arrived at their residence or to prove that defendant had not played a leadership role in the murders. A limiting instruction to the jury that prior inconsistent state-

Bldgs. v. Struthers, 276 Or 1199, 1205, 557 P2d 1350 (1976) (testimony of out-of-court statement not hearsay, because offered for impeachment purposes to show that opponent's witness had made inconsistent statement).

C. *Exclusion of Alibi Evidence*

We now turn to defendant's argument that the trial court erred in excluding his alibi evidence during his third penalty-phase proceeding.

According to the state's case, the Housers were murdered in the early morning hours of June 28, 1987. At his third penalty-phase proceeding, defendant sought the admission of two items of evidence that tended to show that he could not have been at the Housers' home at that time: (1) the transcript of defendant's grandfather's testimony, admitted during the guilt phase, that defendant had been with him from 9:00 p.m. on June 28 until 2:00 a.m. on June 29, 1987; and (2) the testimony of defendant's mother that defendant had been at her home from shortly after 2:00 a.m. on the morning of June 29, 1987, and that, when she awoke at 4:20 a.m. on the same day, defendant was sleeping on a loveseat at her house. The trial court excluded that evidence, apparently on relevance grounds.[19]

On review, defendant argues that the trial court erred in excluding that evidence because it was "mitigating evidence" relevant to the fourth question under ORS 163.150(1)(b), that is, "[w]hether the defendant should receive a death sentence." ORS 163.150(1)(b)(D). The state responds that the trial court properly excluded that evidence because alibi evidence, by definition, is relevant to only a defendant's guilt of the crime charged and, therefore, is not relevant to sentencing.

9. Because the analysis of their relevance is different, we address separately the two different types of alibi evidence that defendant sought to present to the jury. The transcript of defendant's grandfather's testimony — like the transcript of any other witness's testimony — was relevant and subject to consideration in the penalty phase, regardless of its substance, because it was "previously offered and received" during the trial on the issue of guilt. ORS 163.150(1)(a); *see also* ORS 138.012(2)(b)

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ments by a witness are admissible solely for purposes of impeachment often assists in guarding against a jury using such statements for the wrong purpose.

We also note that our conclusion that defendant's proffered evidence had a nonhearsay purpose does not require that that evidence be admitted at any subsequent penalty-phase proceeding. Whether the evidence is admissible in a subsequent proceeding will depend, first, on the purpose for which defendant offers it and, second, on the trial court's evaluation of any objection that the state might raise. Our conclusion here is solely that we disagree with the state that defendant proffered evidence of inconsistent statements by Wilson and Cathey for a hearsay purpose only.

[19] The parties do not cite to the record when referring to the trial court's ruling in that regard. We also have not been able to confirm in the record the parties' position that the trial court excluded the alibi evidence on relevance grounds. However, a precise description of the trial court's actual ruling is not necessary to our opinion, because we focus on the issue as it may arise on remand.

(if reviewing court vacates death penalty, transcript of all testimony, all exhibits, and other evidence properly admitted in prior guilt- and penalty-phase proceedings deemed admissible in remanded penalty-phase proceeding). The trial court therefore erred in sustaining the state's objection to admission of that evidence.

10. We turn to the question of the relevance of defendant's remaining alibi evidence — specifically, his mother's testimony. The state begins its argument with the unassailable premise that capital penalty-phase proceedings occur only if a jury has found a defendant guilty of the substantive offense. From that, the state urges that we infer that evidence of innocence is irrelevant to the penalty-phase proceeding. However, as is clear from this court's case law, as well as decisions of the United States Supreme Court, the question of relevance of a capital defendant's proffered evidence in a penalty-phase proceeding is not that simple. Its relevance is, instead, a matter of statutory construction in the context of federal constitutional requirements. We now turn to that task, using the framework set out in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993) (court first considers text and context of statute at issue, as well as applicable case law construing statute). *See also Swarens v. Dept. of Rev.*, 320 Or 326, 331, 883 P2d 853 (1994) (context includes "statute's development through successive legislatures").

We begin by setting out the relevant parts of the death-penalty statutory scheme. ORS 163.150(1)(a) provides, in part:

> "In the [penalty-phase] proceeding, evidence may be presented as to any matter that the court deems relevant to sentence including, but not limited to, * * * *mitigating evidence relevant to the issue in paragraph (b)(D) of this subsection[.]*"

(Emphasis added.) ORS 163.150(1)(b) provides, in part:

> "Upon the conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:
>
> "* * * * *
>
> "(D) Whether the defendant should receive a death sentence."

The jury instructions accompanying ORS 163.150(1)(b) are set out in ORS 163.150(1)(c), which provides:

> "(A) The court shall instruct the jury to consider, in determining the issues in paragraph (b) of this subsection, *any mitigating circumstances offered in evidence, including but not limited to* the defendant's age, the extent and severity of the defendant's prior criminal conduct and the extent of the mental and emotional pressure under which the defendant was acting at the time the offense was committed.
>
> "(B) The court shall instruct the jury to answer the question in paragraph (b)(D) of this subsection 'no' if, after considering any aggravating evidence *and any mitigating evidence concerning any aspect of the defendant's character or background, or any circumstances of the offense* and any vic-

> tim impact evidence as described in paragraph (a) of this subsection, one or more of the jurors believe that the defendant should not receive a death sentence."

(Emphasis added.)

Our task here is to determine whether defendant's proffered evidence constitutes "mitigating evidence" that is "relevant" to the question set out in ORS 163.150(1)(b)(D), that is, "[w]hether * * * defendant should receive a death sentence." Answering that question, in turn, requires that we determine the intended scope of "mitigating evidence" relevant to ORS 163.150(1)(b)(D).

At the outset, we note that the wording of ORS 163.150(1)(c)(B) — instructing the jury to consider "any" mitigating evidence concerning "any" aspect of the defendant's character or background, or "any" circumstances of the offense — suggests, on its face, that the statutory category of "mitigating evidence" is quite broad and, possibly, unlimited.[20] It likely would follow under

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[20] "Any" is defined, in part, as follows:

> "**1** : one indifferently out of more than two : one or some indiscriminately of whatever kind; * * * **b** : one, no matter what one : EVERY -- used as a function word esp. in assertions and denials to indicate one that is selected without restriction or limitation of choice * * * **3 a** : great, unmeasured, or unlimited in amount, quantity, number, time, or extent : up to whatever measure may be needed or desired * * *[.]"

such a reading that defendant's mother's testimony would qualify as "mitigating evidence" under the statutory provisions, because it arguably relates to circumstances surrounding the offense that mitigate in defendant's favor (that is, defendant's argument that he had not been involved in the crime).

However, we must read the applicable text in its proper context, *PGE*, 317 at 611, which, here, most notably includes earlier versions of the statutory scheme and its development through successive legislatures. As this court has explained before (and as discussed further below), ORS 163.150(1)(b)(D) was enacted in 1989 and originally provided:

> "*If constitutionally required*, considering the extent to which the defendant's character and background, and the circumstance of the offense may reduce the defendant's moral culpability or blameworthiness for the crime, whether a sentence of death be imposed."

Or Laws 1989, ch 790, § 135b (emphasis added). Also in 1989, the legislature created a statutory jury instruction pertaining to all four questions set out in ORS 163.150(1)(b), now set out at ORS 163.150(1)(c)(A), *see* 336 Or at 452 (setting out ORS 163.150(1)(c)(A)), in substantially the same form as it exists today. *See* Or Laws 1989, ch 790, § 135b (enacting that jury instruction as ORS 163.150(1)(c) (1989)); *see also* ORS 163.150(1)(b)(B) (1987) (text of

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Webster's Third New Int'l Dictionary 97 (unabridged ed 1993).

jury instruction now set out as ORS 163.150(1)(c)(A) originally set out as instruction on second statutory question on future dangerousness).

In 1991, the legislature amended ORS 163.150(1)(b)(D) to reflect its current wording, that is, "[w]hether the defendant should receive a death sentence." Or Laws 1991, ch 885, § 2. Also in 1991, the legislature enacted the jury instruction specifically accompanying ORS 163.150(1)(b)(D), set out as ORS 163.150(1)(c)(B), in the following form:

> "In determining the issue in subparagraph (D) of paragraph (b) of this subsection, the court shall instruct the jury to answer the question 'no' if one or more of the jurors find there is any aspect of the defendant's character or background, or any circumstances of the offense, that one or more of the jurors believe would justify a sentence less than death."

Or Laws 1991, ch 885, § 2.[21]

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[21] As discussed earlier in this opinion, the legislature in 1997 amended the jury instruction set out in ORS 163.150(1)(c)(B) as follows:

> "The court shall instruct the jury to answer the question in paragraph (b)(D) of this subsection 'no' if, after considering *any aggravating evidence and any mitigating evidence* concerning any aspect of the defendant's character or background, or any circumstances of the offense *and any victim impact evidence as described in subsection (1)(a) of this section*, one or more of the jurors believe that the defendant should not receive a death sentence."

Or Laws 1997, ch 784, § 1 (emphasis added). That 1997 version of ORS 163.150(1)(c)(B) is essentially identical to the current version of the statute.

As can be seen, the 1997 Legislative Assembly added the terms "aggravating evidence," "mitigating evidence," and "victim impact evidence" to the jury instruction accompanying the fourth question. However, the substance of the original wording of that instruction — "any aspect of the defendant's character or background, or any circumstances of the offense" — remained unchanged after the 1997 amendment. As explained in the text below, that particular wording is drawn in its entirety from United States Supreme Court jurisprudence respecting mitigating evidence under the Eighth Amendment. That jurisprudence therefore informs our understanding of the parameters of that wording.

Turning to the original version of ORS 163.150(1)(b)(D), the above-emphasized phrase, "[i]f constitutionally required," clarified that the requirement that a trial court instruct a jury respecting consideration of relevant evidence admitted under that statutory provision hinged on whether a constitutional provision required consideration of the evidence. The case law construing ORS 163.150(1)(b)(D) clearly explains the constitutional source at issue, as well as the intended scope of relevant "mitigating evidence" under the statutory scheme in its current form, as discussed below.

In *State v. Stevens*, 319 Or 573, 580-82, 879 P2d 162 (1994), this court reviewed the legislative history of ORS 163.150(1)(b)(D), from its enactment in 1989

through its amendment in 1991. In short, the court explained that the legislature originally had enacted that statute in light of the United States Supreme Court's decision in *Penry v. Lynaugh*, 492 US 302, 328, 109 S Ct 2934, 106 L Ed 2d 256 (1989), *abrogated in part on other grounds by Atkins v. Virginia*, 536 US 304, 122 S Ct 2242, 153 L Ed 2d 335 (2002), which had invalidated a three-question statutory death-penalty scheme on the ground that it did not allow the jury to consider fully the effect of the defendant's mitigating evidence regarding his diminished mental capacity. *Stevens*, 319 Or at 580-81. More specifically, in *Penry*, the Court held that, under the Eighth Amendment, a jury "must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the crime." *Stevens*, 319 Or at 581 (quoting *Penry*, 492 US at 328). *See* 336 Or at 427 n 2 (setting out Eighth Amendment).

The court in *Stevens* further explained that, shortly after the legislature enacted ORS 163.150(1)(b)(D) in 1989, this court held in *Wagner II*, 309 Or at 18-19, that that statute did not satisfy the Eighth Amendment directive set out in *Penry*. *Wagner II*, 309 Or at 18-19. Consequently, the legislature in 1991 amended ORS 163.150(1)(b)(D) to its present form (that is, "[w]hether the defendant should receive a death sentence") and enacted the corresponding jury instruction set out in ORS 163.150(1)(c)(B). *Stevens*, 319 Or at 581-82. The court in *Stevens* specifically noted that, in amending ORS 163.150(1)(b)(D) in 1991, the legislature intended to codify — and indeed precisely adopted — this court's

proffered wording from *Wagner II*. *Stevens*, 319 Or at 582.

After reviewing the development of ORS 163.150(1)(b)(D) through its 1991 amendment, the legislative history of that statute, the Supreme Court's decision in *Penry*, and this court's decision in *Wagner II*, this court in *Stevens* concluded:

> "The passage of the original fourth question after *Penry* and the modification of that question following *Wagner II* make it clear that *the legislature intended the scope of the statutory fourth question to be co-extensive with the scope of the fourth question held in Penry and Wagner II to satisfy the requirements of the Eighth Amendment to the Constitution of the United States*. Accordingly, cases dealing with the Eighth Amendment fourth question and with the evidence relevant to that question inform our inquiry as to the scope of the evidence that is relevant under the statute."

319 Or at 582-83 (emphasis added). *See also Guzek II*, 322 Or at 258 (citing *Stevens* for proposition that, in enacting fourth question, legislature was "attempting to bring Oregon's death penalty scheme in compliance with *Penry*"). The court in *Stevens* then went on to examine Supreme Court decisions that discussed the phrase "mitigating evidence relevant to a defendant's background and character or the circumstances of the crime," 319 Or at

583 (internal quotation marks omitted), as those decisions related to the evidentiary issue in *Stevens*.[22]

In sum, this court concluded in *Stevens* that, in using the phrase "any aspect of the defendant's character or background, or any circumstances of the offense" in the jury instruction set out in ORS 163.150(1)(c)(B), the legislature intended to limit the admission of "mitigating evidence" in penalty-phase proceedings so as to satisfy the Eighth Amendment. Specifically, the legislature intended to ensure the admissibility of such evidence that the Eighth Amendment *requires* that a penalty-phase jury consider. The remaining question, then, involves a determination whether the alibi evidence that defendant proffered at his third penalty-phase proceeding — specifically, his mother's testimony — fell within that federal constitutional category. As explained below, the Supreme Court's Eighth Amendment jurisprudence suggests that defendant's alibi evidence is the type of evidence that a defendant is constitutionally entitled to introduce during the penalty phase for the jury's consideration.

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[22] The issue in *Stevens* was whether testimony of the defendant's wife regarding the potential effect on defendant's daughter of imposition of the death penalty on defendant fell within the scope of "mitigating evidence relevant to the issue in [ORS 163.150(1)(b)(D)]." ORS 163.150(1)(a). The court ultimately concluded that the testimony qualified as "mitigating evidence" under the statutory scheme because it suggested something particular about the defendant's "character" or "background," as the Supreme Court had applied those terms in earlier cases. *Stevens*, 319 Or at 583-85.

We begin our discussion with the plurality decision in *Lockett v. Ohio*, 438 US 586, 98 S Ct 2954, 57 L Ed 2d 973 (1978), which was a precursor to *Penry*. The defendant in *Lockett* was charged with aggravated murder resulting from a robbery of a pawnshop. According to the state's evidence, the defendant had participated with others in the planning of the robbery; however, she had remained in the car outside the pawnshop during the robbery and ensuing murder of the pawnbroker. During the guilt phase, defense counsel initially had argued that the defendant had been unaware that a robbery had taken place; however, the defendant ultimately presented no evidence to rebut the state's case.[23] The jury convicted the defendant of aggravated murder in the course of a robbery. From the jury instructions quoted in the plurality's opinion, it appears that the jury found that the defendant intentionally had participated in the robbery and that the circumstances of the robbery allowed the jury further to find, by operation of state law, that the defendant had intended to kill the pawnbroker. 438 US at 589-93.

Various psychiatric and psychological reports then were prepared for a subsequent capital sentencing proceeding before a judge. Those reports, which contained, among other things, statements from a codefendant that the defendant had not participated in planning the robbery and had left the car to eat during the robbery, were

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[23] The defendant had attempted to call two witnesses in her behalf; however, they both invoked the Fifth Amendment and did not testify. The defendant similarly invoked the Fifth Amendment. 438 US at 592-93.

admitted into evidence at sentencing. 438 US at 594, 594 n 2.

The applicable statutory scheme required the trial court to sentence the defendant to death unless it found, by a preponderance of the evidence, that one or more of three statutory mitigating factors applied, relating to the potential existence of duress, coercion, or provocation; the potential existence of psychosis or mental deficiency; and the potential role of the victim in the offense. Finding that none of those factors applied (particularly, the "psychosis or mental defect" factor), the trial court sentenced the defendant to death. 438 US at 593-94.

Before the Supreme Court, the defendant argued that the statutory scheme violated the Eighth Amendment. After reviewing its jurisprudence, a plurality of the Court stated:

> "* * * [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case,[24] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record *and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death*."

438 US at 604 (first emphasis in original; second emphasis added). The plurality added that "[n]othing in this

[24] The court cited as a possible exception an intentional homicide committed by a prisoner or escapee serving a life sentence. *Lockett*, 438 US at 604 n 11.

opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of [the] offense." *Id.* at 604 n 12.

The plurality then evaluated the statutory scheme at issue in light of the foregoing rule and concluded that, in permitting the consideration of only three specific mitigating factors, that scheme violated the Eighth Amendment. Specifically, under the scheme,

> "*[t]he absence of direct proof that the defendant intended to cause the death of the victim* is relevant for mitigating purposes only if it is determined that it sheds some light on one of the three statutory mitigating factors. *Similarly, consideration of a defendant's comparatively minor role in the offense*, or age, would generally not be permitted, as such, to affect the sentencing decision."

Id. at 608 (emphasis added).

In a companion case issued the same day, *Bell v. Ohio*, 438 US 637, 98 S Ct 2977, 57 L Ed 2d 1010 (1978), the same plurality vacated a death sentence imposed on another defendant under the same state statutory scheme. A jury had convicted the defendant in *Bell* of aggravated murder in the course of a kidnapping.[25] Among other things, the reports submitted at his sentencing hearing noted the defendant's claim that he had not

[25] It appears that, similar to *Lockett*, the jury likely found the murder to have been intentional by operation of state law, stemming from its guilt finding on the kidnapping charge.

been aware of the codefendant's actions when the codefendant had killed the victim and also noted that the defendant allegedly had been taking mescaline on the night of the crimes. Also at sentencing, the defendant testified that he had been under the influence of drugs on the night of the crimes and that he had gone along with the codefendant because he had been afraid. Finding that none of the statutory mitigating factors applied, the trial court sentenced the defendant to death. *Bell*, 438 US at 639-41.

Before the Supreme Court, the defendant argued that his youth, his cooperation with the police, and "the lack of proof that he had participated in the actual killing strongly supported an argument for a penalty less than death." *Id.* at 641-42. A plurality of the Court agreed that, under *Lockett*, the defendant's sentence violated the Eighth Amendment because the statutory scheme had precluded the trial court "from considering the particular circumstances of his crime and aspects of his character and record as mitigating factors." *Id.* at 642.

Almost four years after *Lockett* and *Bell*, a majority of the Supreme Court adopted and applied the rule set out in those cases, that is, that "the Eighth and Fourteenth Amendments require that the sentencer * * * not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Eddings v. Oklahoma*, 455 US 104, 110, 102 S Ct 869, 71 L Ed 2d 1 (1982) (quoting *Lockett*, 438 US at 604 (ellipses in *Eddings*; original emphasis omitted). In adopting that rule,

the court noted that, "[i]n some cases, such evidence properly may be given little weight." *Id.* at 115.

11. *Lockett* and its progeny stand for the proposition that, under the Eighth Amendment, a court must allow a defendant to present at sentencing, and a sentencer must be able to consider, any evidence relevant to any circumstances of the offense that mitigates against imposition of the death penalty. As demonstrated by *Lockett* and *Bell*, that includes evidence that a defendant played an insignificant role in the offense or otherwise possessed a less culpable *mens rea*, notwithstanding an earlier guilt finding of intentional participation in capital murder. Further, the Court's statement in *Eddings*, 455 US at 110, that a sentencer is free to accord a defendant's proffered mitigating evidence little weight clarifies that evidence that is not particularly trustworthy still is admissible under the command of the Eighth Amendment if it is relevant to a defendant's character or record, or to the circumstances of the offense. *See also generally Sawyer v. Whitley*, 505 US 333, 342-43, 112 S Ct 2514, 120 L Ed 2d 269, *reh'g den*, 505 US 1244 (1992) (*Lockett* and its progeny hold that capital defendants permitted to introduce "wide variety of mitigating evidence").

The foregoing reading of *Lockett* and *Bell* generally supports the admission of defendant's alibi evidence, because that evidence concerned "circumstances of the offense" (*i.e.*, defendant's professed lack of involvement, notwithstanding his earlier murder convictions) that, if believed, would have mitigated against imposition of the death penalty. However, we acknowledge that the juries in *Lockett* and *Bell* appear to have based their respective

guilty verdicts for capital murder on factual findings that the defendants actively had participated in the underlying felonies of aggravated robbery (*Lockett*) and aggravated kidnapping (*Bell*), which, by operation of state law, allowed the juries also to find the defendants guilty of capital murder. Such guilt-phase findings therefore would have left open the possibility that proffered sentencing-phase evidence that the defendants had not intended to kill the victims, or otherwise had played only peripheral parts in the underlying felonies (although with the requisite intent respecting those felonies), would mitigate against imposition of the death penalty, notwithstanding the earlier capital murder convictions. Defendant in this case, by contrast, was convicted of the aggravated murders — defined in part as "intentionally" causing death, ORS 163.095; ORS 163.115(1)(a); ORS 163.005 — of both victims. Defendant's alibi evidence was inconsistent with those convictions; by contrast, the mitigating evidence at issue in *Lockett* and *Bell* was consistent with the underlying convictions, because the defendants could have been convicted of capital crimes notwithstanding their lessened culpability respecting the capital murders.

However, the foregoing factual distinction between *Lockett* and *Bell*, on the one hand, and the case at bar, on the other, is of no consequence in light of the Supreme Court's decision in *Green v. Georgia*, 442 US 95, 99 S Ct 2150, 60 L Ed 2d 738 (1979), issued the year after *Lockett* and *Bell*. The defendant in *Green* had been convicted of murder, as had a codefendant. Unlike the defendants in *Lockett* and *Bell*, it appears that the defendant in *Green* had been convicted of the murder itself — that

is, of the intentional killing of the victim — rather than of more limited, intentional participation in an underlying capital felony.[26] At sentencing, the defendant sought to introduce testimony of a third person that the codefendant had stated to that person that the codefendant had killed the victim after sending the defendant on an errand. The defendant had not sought to introduce that testimony during the guilt phase of his trial. The trial court excluded the evidence on hearsay grounds, and the Georgia Supreme Court affirmed. 422 US 95-96; *Green v. State*, 242 Ga 261, 272-73, 249 SE2d 1, 9-10 (1978).[27]

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[26] The Supreme Court's decision stated that the defendant had been indicted, with a codefendant, of rape and murder, and had been convicted separately of murder. 442 US at 95. Likewise, the Georgia Supreme Court decision subject to review, as well as that court's decision following a new guilt-phase proceeding, both stated that the defendant had been convicted of murder, and the initial state court decision also discussed evidence of an admission on the defendant's part that he personally had killed the victim. *Green v. State*, 242 Ga 261, 261, 249 SE2d 1, 3-4 (1978); *Green v. State*, 246 Ga 598, 598, 272 SE2d 475, 479 (1980). No description of the facts or procedural history by either court suggests that, like the defendants in *Lockett* and *Bell*, the defendant in *Green* had been indicted and convicted of murder on any felony-murder or aid-and-abet theory of guilt.

[27] The Georgia Supreme Court surmised that the defendant had not introduced the disputed evidence during the guilt phase because that evidence would have demonstrated that the defendant "actively and knowingly [had] participated in the entire criminal enterprise[,] including the robbery, kidnapping, and rape of the victim," as well as leaving the victim

In a brief per curiam, eight-to-one decision, the Supreme Court reversed. The Court stated:

> "Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. *The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial, see Lockett* * * *, 438 US * * * [at] 604-05 * * *, and substantial reasons existed to assume its reliability."[28]

Id. at 97 (emphasis added). Thus, in *Green*, the Supreme Court concluded that, under *Lockett*, the defendant's evidence that he had not participated in the murder was a relevant circumstance of the offense that the sentencer must consider, notwithstanding that the defendant already had been convicted of the victim's murder.

As can be seen, the facts of *Green* appear to be analogous to the facts at issue here. As in *Green*, defendant here already had been convicted of the murders of

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with the armed codefendant (who had made murderous statements to the defendant), helping to dispose of the victim's body, and leaving the state with the victim's car, the murder weapon, and part of the robbery proceeds. *Green*, 242 Ga at 272, 249 SE2d at 9.

[28] The Court's reference to, and subsequent discussion of, the "reliability" of the hearsay statement pertained to the parameters of the constitutionally based exception to the hearsay rule discussed in *Chambers v. Mississippi*, 410 US 284, 302, 93 S Ct 1038, 35 L Ed 2d 297 (1973).

the victims, and, notwithstanding those earlier convictions, defendant sought to introduce evidence at his third penalty-phase proceeding — which he did not seek to introduce during the guilt phase — that, if believed, would have shown that he had not been present at the victims' home at the time of the murders. Applying the Court's reasoning in *Green*, we conclude that such evidence was "highly relevant to a critical issue" in the penalty phase, *Green*, 442 US at 97, and therefore was required to be considered by the jury under the Eighth Amendment.[29] It follows that that evidence also qualified

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[29] The Supreme Court ultimately grounded its conclusion in *Green* in the Due Process Clause of the Fourteenth Amendment to the United States Constitution, in light of the Court's application of the exception to the hearsay rule established in *Chambers*, 410 US at 302. In reaching that conclusion, the Court emphasized the fact that, contrary to its objection to the evidence at issue in mitigation in *Green*, the state had introduced the hearsay evidence at issue in aggravation in the capital trial of the *Green* defendant's codefendant. In that connection, the Court concluded that the defendant in *Green* unconstitutionally had been denied a fair trial. *Green*, 442 US at 97.

However, the fact that the Supreme Court ultimately relied on the Due Process Clause to reverse the defendant's conviction in *Green* does not lessen the import of the Court's citation to *Lockett* for the principle that the evidence at issue was "highly relevant" to a "critical issue" in the sentencing determination. *Green*, 442 US at 97. When read in full, the Court's reasoning in *Green* can be broken down into the following analytical conclusions: (1) the Eighth Amendment required that the jury not be precluded from considering the defendant's mitigating evidence respecting a circumstance of

as "mitigating evidence" under the statutory scheme set out in ORS 163.150(1)(a), (b)(D), and (c)(B). Accordingly, the trial court erred in excluding that evidence at defendant's third penalty-phase proceeding, and, if the state again pursues the death penalty on remand, and if defendant again offers his alibi evidence, that evidence shall be admissible.[30]

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the offense -- specifically, evidence that he was not present during the actual murder; (2) the evidence was supported by factors tending to establish its reliability; and (3) given that the evidence was relevant under the Eighth Amendment and sufficiently reliable, the *Chambers* hearsay exception applied. In short, notwithstanding its ultimate conclusion under the Due Process Clause, the Court's reliance on *Lockett* was illustrative of its view that mitigating evidence under the Eighth Amendment includes evidence of a less-than-significant role in the capital offense, including evidence that a defendant previously convicted of murder was not present during the capital offense. Again, the Court made that point in the context of a case in which neither that Court nor the state supreme court had suggested that the defendant had been convicted on anything less than a theory of direct liability for murder.

[30] We note that, in *Franklin v. Lynaugh*, 487 US 164, 172, 174, 108 S Ct 2320, 101 L Ed 2d 155, *reh'g den*, 487 US 1263 (1988); *id.* at 187-88 (O'Connor, J., concurring), a plurality of the Supreme Court strongly suggested, and the concurrence would have held, that the Eighth Amendment does not require an *instruction* that a penalty-phase jury consider any *residual or lingering doubts* remaining from the guilt phase. However, nothing in that decision lessened the direction from *Lockett*, *Bell*, *Eddings*, and *Green* that the Eighth

VI. CONCLUSION

As the state concedes, the trial court erred in refusing to instruct the jury respecting the true-life sentencing option, after defendant waived any *ex post facto* challenges to that option under Article I, section 21, of the Oregon Constitution and Article I, section 10, of the United States Constitution. In light of that error, we reverse defendant's death sentence and remand for resentencing.

We further conclude that the prohibition against *ex post facto* laws contained in Article I, section 21, of the Oregon Constitution precludes the admission of "any aggravating evidence" against defendant under the current versions of ORS 163.150(1)(a) and (c)(B) against defendant on remand. However, even if Article I, section 21, also would preclude the admission of victim-impact evidence against defendant under those statutory provisions, the victims' "right * * * to be heard" set out in Article I, section 42, of the Oregon Constitution supersedes any protection afforded to defendant under Article I, section 21. Additionally, the *Ex Post Facto* Clause of Article I, section 10, of the United States Constitution does not preclude the admission of victim-impact evidence against defendant under the current versions of

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Amendment *does* require that a defendant be permitted to *introduce*, and a jury be able to consider, *mitigating evidence relevant to any circumstances of the offense*, such as evidence that would lessen the defendant's culpability in the offense. Simply stated, a "residual" or "lingering doubt[]" remaining from the guilt phase, *Franklin*, 487 US at 174, is qualitatively different from actual "evidence" proffered during the penalty phase.

ORS 163.150(1)(a) and (c)(B), because the amendments to those statutory provisions did not lower the minimum quantum of evidence required to obtain a sentence of death.

Further, in any subsequent penalty-phase proceeding, if defendant offers evidence of inconsistent statements by state witnesses to impeach their testimony, then the trial court must determine whether that evidence has a non-hearsay purpose. If it does, then the evidence may not be excluded on the basis of the hearsay rule alone. Finally, under the "mitigating evidence" provisions of ORS 163.150(1) and the Eighth Amendment to the United States Constitution, as well as under the applicable provisions of ORS 163.150(1)(a) and ORS 138.012(2)(b) (relating to a capital defendant's "prior trial and sentencing proceeding" and "all evidence previously offered and received"), any alibi evidence that defendant proffers in mitigation shall be admissible.

We have reviewed the remaining assignments of error and have concluded that they are without merit or are unlikely to arise on remand. Further discussion of those assignments would not benefit the bench, bar, or public.

The sentence of death is vacated, and the case is remanded to the circuit court for further proceedings.

DURHAM, J., concurring.

I concur in Justice Riggs's opinion for the court, which vacates the sentence of death and remands the case for further proceedings.

The opinion correctly answers several questions that are likely to arise on remand if the state elects, under

ORS 138.012(2)(a)(B), to conduct a new sentencing proceeding before a new sentencing jury. The questions that the court addresses focus principally on the evidence that the parties may offer in such a proceeding on remand.

The court's opinion does not address another argument that defendant raises that, if sustained, would obviate the need for a new sentencing proceeding. Defendant urges this court to reconsider and overrule its decision in *State v. Wagner*, 309 Or 5, 786 P2d 93 (1990) (*Wagner II*). According to defendant, when these murders occurred in 1987, Oregon's 1985 death penalty statute was in effect and is applicable to this case. Defendant argues that that statute contained no provision requiring the fact-finder to consider any mitigating circumstances regarding the murders. For that reason, defendant asserts, Oregon's 1985 statute violated pertinent federal constitutional principles and does not authorize imposition of a sentence of death in this case. *See Penry v. Lynaugh*, 492 US 302, 109 S Ct 2934, 106 L Ed 2d 256 (1989) (holding that similar Texas statute did not authorize sentence of death, because it lacked provision requiring consideration of mitigation factors).

I previously have expressed the view that the court wrongly decided *Wagner II* and that the court should reconsider that decision. *State v. Montez*, 324 Or 343, 346-47 n 5, 927 P2d 64 (1996); *State v. Pinnell*, 319 Or 438, 449, 887 P2d 635 (1994) (Durham, J., dissenting). I adhere to that view. The reasoning that the court adopted in *Wagner II* is indefensible and warrants no deference under this court's doctrine of *stare decisis*.

Wagner II, however, is not the last word on this subject. Since this court issued that decision, the legislature has amended ORS 138.012(2)(b) and ORS 163.150(1)(c)(B) to require the trial court to instruct the jury, in a sentencing proceeding on remand, to consider any mitigating circumstances offered in evidence, among other things. Defendant may argue that those legislative amendments occurred after the murders occurred, but that argument alone does not establish that the amendments are *ex post facto* laws or are inapplicable or invalid for some other reason.

The court is in no position to disregard the legislature's later enactments unless the parties' briefing demonstrates that the legislature has exceeded its authority or otherwise has failed to meet constitutional requirements. In regard to *Wagner II*, defendant must demonstrate not only that this court wrongly decided *Wagner II*, but also that the error entitles him to a different disposition notwithstanding the legislature's later attempts to fix the problem. The parties' briefing does not sufficiently address, and the court's opinion does not decide, that question.

I agree with the court's decision not to address whether the error in *Wagner II* requires a different result in this case. From this vantage point, the court cannot determine with certainty that the dispute over *Wagner II* is likely to arise on remand. If it does arise, then the parties should address in detail the issues discussed in this opinion.

I concur.

GILLETTE, J., concurring in part and dissenting in part.

I join all of the majority opinion in this unfortunate case except for the majority's regrettable discussion and disposition of defendant's assignment of error respecting the trial court's refusal to permit him to present certain "alibi" evidence. As to that subject, and contrary to the majority, I believe that the trial court's ruling excluding that evidence was precisely correct. I therefore respectfully dissent from that part of the majority opinion.

One piece of context for the majority's analysis of the problem — and of mine — cannot be overemphasized. The jury in this case was empaneled to decide only whether this defendant should receive the death penalty; *the question whether defendant was personally, criminally responsible for the deaths of the two victims had already been established by a separate jury trial, and that verdict had been affirmed on appeal. See State v. Guzek*, 310 Or 299, 304, 797 P2d 1031 (1990) (affirming defendant's convictions for two counts of aggravated murder). For various reasons, defendant's sentence of death for those two murders has twice been reversed, and the present appeal is from the third jury verdict determining that defendant should receive the death penalty.

As the majority explains, *State v. Guzek*, 336 Or at 450, defendant in this case proffered evidence from two relatives to the effect that defendant could not have been one of the murderers, because he was elsewhere at the time. That is, he offered evidence that, in spite of the aforementioned jury verdict to the contrary, he was innocent of the crimes.

Defendant offered that evidence as "mitigating evidence" under ORS 163.150(1)(b)(D), which requires a court to submit to a jury in a case in which the defendant has been found guilty of aggravated murder the question "[w]hether the defendant should receive a death sentence." A separate part of ORS 163.150(1) directs the trial court to give a specific instruction to the jury in connection with the foregoing question. It provides, in part:

> "The court shall instruct the jury to answer the question in paragraph (b)(D) of this subsection 'no' if, after considering any aggravating evidence *and any mitigating evidence concerning any aspect of the defendant's character or background, or any circumstances of the offense* * * * one or more of the jurors believe that the defendant should not receive a death sentence."

ORS 163.150(1)(c)(B) (emphasis added). The issue in this case is whether, under the emphasized wording of that statutorily required jury instruction, defendant was entitled to have the jury consider the evidence that he proffered. The majority says that he was. I disagree.

The majority first divides the proffered evidence into two separate categories. 336 Or at 451. Respecting the testimony of defendant's grandfather, defendant offered the transcript of the grandfather's testimony from a previous trial of the case. The trial court refused to admit it. As the majority correctly notes, ORS 138.012(2)(b) provides that, in a sentencing proceeding conducted after reversal of an earlier proceeding, a transcript of all testimony, exhibits, and other evidence property admitted in

the former proceedings is admissible in the later proceeding. Thus, the majority concludes, the trial court's contrary ruling respecting the grandfather's testimony was error. 336 Or at 451 (slip opinion at 39).

I disagree that the trial court erred, because it is not clear to me that the statute automatically makes admissible *all* evidence, whatever its subject matter, from prior trials. The statute provides, in part that, in a new sentencing proceeding:

> "A transcript of all testimony and all exhibits and other evidence properly admitted in the prior trial and sentencing proceeding are admissible in the new sentencing proceeding. Either party may recall any witness who testified at the prior trial or sentencing proceeding and may present additional *relevant* evidence."

ORS 138.012(2)(b) (emphasis added). The question is not free from doubt, but I would read the legislature's use of the qualifying word, "relevant," in the final sentence of ORS 138.012(2)(b) as indicating the legislature's intention to limit the admissibility of any evidence in the later proceeding to "relevant" evidence. Certainly, and in any event, if the grandfather's testimony would not have been relevant to any issue properly left for the jury to decide — as I believe to be the case — defendant can claim no *prejudicial* error in denying admission of the transcript of the grandfather's testimony.[31]

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[31] For some reason, the state did not, in its extensive briefing in this case, separately discuss either the grandfather's or the mother's testimony.

The focus of the majority's analysis is the testimony of defendant's mother, which had not been offered previously and which, like that of the grandfather, would (if believed) be wholly exculpatory. The majority does an admirable job of tracing the lineage of the wording of ORS 163.150(1)(b)(D) and (c)(B). 336 Or at 452-57. That history establishes, as the majority acknowledges, that what the legislature intended to allow as "mitigating" evidence was precisely what the United States Supreme Court would require pursuant to the federal constitution; nothing more, nothing less. Thus, the true question in the case boils down to this: Would the United States Supreme Court, if faced with the question, hold that a defendant in the position of defendant here would be entitled, in a penalty phase proceeding, to assert that he should receive a sentence less than death because, in fact, he is innocent of the underlying crime?

In my view, there is no clear binding authority respecting the issue. A majority of the Supreme Court never has dealt with the question. However, a four-judge plurality of that Court did address an analogous issue in 1988 in a way that is (in my view) so clear (and so clearly right) that I am content simply to adopt the plurality's view now:

> "At the outset, we note that this Court has never held that a capital defendant has a constitutional right to an instruction telling the jury to revisit the question of his identity as the murderer as a basis for mitigation. Petitioner suggests that our discussion of the 'residual doubt' question in *Lockhart v. McCree*, 476 US 162, 180-182, [106

> S Ct 1758, 90 L Ed 2d 137] (1986), supports his position that he has such an entitlement. * * * But all that this aspect of the *Lockhart* opinion stands for is the simple truism that *where* 'States are willing to go to allow defendants to capitalize on "residual doubts,"' such doubts will inure to the defendant's benefit. *Lockhart*, *supra*, at 181. *Lockhart* did not endorse capital sentencing schemes which permit such use of 'residual doubts,' let alone suggest that capital defendants have a *right* to demand jury consideration of 'residual doubts' in the sentencing phase. Indeed, the *Lockhart* dissent recognized that there have been only a 'few times in which any legitimacy has been given' to the notion that a convicted capital defendant has a right to argue his innocence during the sentencing phase. 476 US, at 205-206 (Marshall, J., dissenting). The dissent also noted that this Court has not struck down the practice in some States of prohibiting the consideration of 'residual doubts' during the punishment trial. *Ibid.*"

Franklin v. Lynaugh, 487 US 164, 172-73, 108 S Ct 2320, 101 L Ed 2d 155 (1988) (White, J., plurality opinion) (emphasis in original) (footnote omitted). That is the line that this court should follow, unless and until the Supreme Court, forced to face the issue, tells us that we are wrong.

The majority argues that it has found a contrary holding in the Court's brief, eight-to-one per curiam decision in *Green v. Georgia*, 442 US 95, 99 S Ct 2150, 60 L Ed 2d 738 (1979), but I find it impossible to imagine

how, nine years later, four members of the Court could say what they said in *Lynaugh*, if this court's majority correctly understands *Green*. In my view, as explained below, this court's majority has not correctly understood *Green*.

The majority explains that, in *Lockett v. Ohio*, 438 US 586, 98 S Ct 2954, 57 L Ed 2d 973 (1978), and *Bell v. Ohio*, 438 US 637, 98 S Ct 2977, 57 L Ed 2d 1010 (1978), a plurality of the Supreme Court held that the Eighth and Fourteenth Amendments require that a sentencing jury be allowed to consider, "*as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[32] *Lockett*, 438 US at 604 (emphasis in original). The majority appears to recognize that, as interpreted in *Lockett* and *Bell*, "circumstances of the offense" relates to facts that would tend to reduce a defendant's relative moral culpability for the crime, such as evidence of the defendant's minor participation in the killing of the victim, for which he was held liable on an aiding-and-abetting theory. 336 Or at 460-41. On the basis of *Green*, however, the majority concludes that alibi evidence tending to prove that defendant did not participate *at all* in the crime is relevant to a "circumstance of the offense," as interpreted by the Supreme Court, and, therefore, such evidence must be admitted during the penalty phase pursuant to the Eighth Amendment. According to the majority, *Green* supports that conclusion, because that case involved the introduction of testimony that contradicted the jury's earlier finding of direct liability for the murder and because it includes the following sentence: "The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial, *see* [*Lockett*, 438 US at 604-05] (plurality opinion); *id.*, at 613-616 (opinion of Blackmun, J.), and substantial reasons existed to assume its reliability." *Green*, 442 US at 97.

[32] The plurality holding of *Lockett* ripened into a majority holding of the Court in *Eddings v. Oklahoma*, 455 US 104, 102 S Ct 869, 71 L Ed 2d 1 (1982).

There are three problems with placing *Green* so prominently within the Court's Eighth Amendment-*Lockett* jurisprudence. First, I disagree with the conclusion that the defendant in *Green*, like defendant in this case, sought to introduce evidence that contradicted the jury's guilt-phase findings and would have led to an acquittal. Second, the citation to *Lockett* reflects nothing more than the Court's conclusion that the defendant sought to introduce evidence about his minor participation in the actual killing of the victim, which was precisely the type of evidence made relevant by both the plurality and concurring opinions in *Lockett*. Third, the circumstances surrounding *Green* and its actual holding minimize its significance as a useful precedent for this case.

I begin with the majority's first major premise, which is that "the defendant in *Green* had been convicted of the murder itself — that is, of the intentional killing of the victim — rather than of more limited, intentional participation in an underlying capital felony." 336 Or at 461 (slip op at 54). The Supreme Court's opinion in *Green* suggests otherwise. In the factual description of the case,

the Court states that "[t]he evidence at trial tended to show that petitioner and Moore abducted Allen from the store where she was working alone and, *acting either in concert or separately*, raped and murdered her." *Green*, 442 US at 96 (emphasis added). The Court's disjunctive description indicates that the defendant in *Green* was tried for murder either as one of the killers or as a participant in the underlying felony, as was possible under the Georgia murder statute. *See Scott v. State* 252 Ga 251, 252, 313 SE2d 87, 88 (1984) (explaining that, under Georgia Code Annotated 26-1101, a defendant may be convicted of felony murder when "acting in concert" with a codefendant in committing a crime and a death occurred). The Court's description also echoes in general the elements of felony murder — the defendant, or someone acting in concert with the defendant, caused the death of another person during the course of committing a felony. *See, e.g.*, Erwin S. Barbre, Annotation, *Criminal Liability Where Act of Killing Is Done by One Resisting Felony or Other Unlawful Act Committed by Defendant*, 56 ALR3d 239, 249 (1974) (discussing cases holding that "in order to convict a defendant under the felony-murder rule the act of killing must be that of defendant and that to be his act, the act must be committed by defendant or *one acting in concert with him*") (emphasis added). Thus, the Court may have thought that the defendant in *Green* was convicted on a felony- murder theory.

That approach would make sense from the state's perspective in *Green*. The state had clear evidence of defendant's participation in the kidnapping and the acts taken in concert with his codefendant. Once the murder

conviction was secured, the state then could argue — as it did during the penalty phase — that the defendant was directly involved in shooting the victim because she suffered two wounds, and the defendant should receive the death penalty for his participation in the killing. *Green*, 442 US at 96 n 2. That argument by the state would have been unnecessary if the guilt-phase jury — which also sat during the penalty phase — already had found that Green was directly responsible for the victim's death.

Green also cites *both* the *Lockett* plurality *and* Justice Blackmun's concurrence. *Green*, 442 US at 97 (citing *Lockett*, 438 US at 604-05; *id.* at 613-16 (Blackmun, J., concurring)). The Court's citation to Justice Blackmun's concurrence is revealing, because, in *Lockett*, Justice Blackmun took a narrower approach than the plurality. He would have held only that a state court may not sentence an aider-and-abettor to death without allowing the sentencer to consider the extent of that person's involvement, and degree of *mens rea*, in the commission of the homicide. *Lockett*, 438 US at 614. By citing Justice Blackmun's concurrence and its discussion of aiding-and-abetting liability, the Court reveals that the "critical issue" in *Green* is whether a defendant — who, along with a codefendant, has been found guilty of murder — may show that his *relative* culpability for the crime is minimal because he neither participated in the killing nor intended it to occur.

The majority asserts that, because neither the state lower courts nor the Supreme Court suggested otherwise, the defendant in *Green* must have been indicted and convicted for intentionally killing the victim. 336 Or at 461

n 26. I do not find that inference from silence persuasive. In my view, unlike defendant in this case, the Court did not view the defendant in *Green* as attempting to challenge his liability for the crime. Rather, just as in *Lockett*, the defendant in *Green* attempted to reduce, but not eliminate, his relative culpability by arguing that he did not intend the killing to occur. Under that more limited reading, which I think accurately describes the Court's understanding of the facts before it, the majority's effort to place *Green* in the same factual posture as the present case fails.

I turn to my second disagreement with the majority's application of *Green*. To make *Green* work, the majority not only must find a factual similarity between that case and this case; the majority also must decide that, as a matter of law, *Green* concluded that the Eighth Amendment requires that, if offered, certain exculpatory evidence must be submitted at the penalty phase. To that end, the majority relies on the following sentence: "The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial, *see* [*Lockett*, 438 US at 604-05] (plurality opinion); *id.*, at 613-616 (opinion of Blackmun, J.), and substantial reasons existed to assume its reliability." *Green*, 442 US at 97. The majority's reliance on that sentence for its view of *Green*'s legal conclusion is unavailing.

First, the quoted sentence does not identify the "critical issue" to which it refers. As explained above, the facts and procedural history of *Green* are sufficiently ambiguous to suggest that the Court viewed the excluded testimony as relevant because it showed that defendant

was a minor participant in a crime for which he properly was held liable — again, an uncontroversial view after *Lockett*.

Moreover, *Green* does not mention the Eighth Amendment, and the citation to *Lockett* comes within the context of a discussion of the relevance and reliability of the proffered testimony. As I read the Court's opinion, *Green*'s citation to *Lockett* simply supports the claim that the evidence is logically relevant to the issues at the penalty phase. Stating that evidence is relevant to the critical issue of defendant's culpability is distinguishable, however, from holding that evidence must be admitted at the penalty phase under the Eighth Amendment. Yet the majority suggests that *Green* sweeps precisely that broadly. 336 Or at 462-63 n 29.

Finally, the majority purports to find an Eighth Amendment holding in *Green* on the basis of the particular factual circumstances of the case and the citation to *Lockett*. Answering the Eighth Amendment question, however, was unnecessary to the Court's disposition of the case. Once the Court concluded that the proffered hearsay testimony met the minimal requirements of relevance and reliability, it took the safer route and applied the established due process rule of *Chambers v. Mississippi*, 410 US 284, 302, 93 S Ct 1038, 35 L Ed 2d 297 (1973) ("[T]he hearsay rule may not be applied mechanistically to defeat the ends of justice."). The Court's approach left for another day the more controversial question of whether, and under what circumstances, the Eighth Amendment requires the admission of certain mitigating evidence at the penalty phase. As the majority

notes, the Court reached that conclusion three years *after Green*, in *Eddings*, 455 US at 114.

In sum, the legal discussion in *Green* (such as there is) provides no persuasive support for the view that the Eighth Amendment requires certain alibi evidence to be admitted during the penalty phase.

As to my final disagreement with the majority's application of *Green*, I observe that the circumstances of *Green* also militate against the majority's interpretation of that case. The defendant in *Green* argued that he should have been allowed to offer in evidence a confession that his codefendant made to a third party, which indicated that the codefendant was solely responsible for the murder. According to the Court, under Georgia's evidence rules, the confession was admissible during the guilt phase of the codefendant's trial, and the state freely relied on it in winning a conviction. When it came time for the defendant to use the same confession during the penalty phase of his trial, however, the state argued that it was inadmissible hearsay. The trial court accepted that theory, and then the state expressly invited the penalty-phase jury to infer that the defendant was a direct participant in the killing. *Thus, the mechanistic application of the hearsay rule deprived the defendant of presenting not only effective evidence regarding his lack of culpability, but evidence that would counter an express argument that the state had made during the penalty phase.*

Faced with such a "heads we win, tails you lose" interpretation in a death-penalty case, the Court summarily granted *certiorari*, vacated the opinion below without argument, and issued a short, three-paragraph per curiam

opinion that relied on *Chambers* to hold that the state's approach to the hearsay rule violated the Due Process Clause. The Court took pains to limit its opinion. The Court stated at the outset that, "under the facts of this case," the exclusion of the evidence at the penalty phase violated the Due Process Clause, not the Eighth Amendment. *Green*, 442 US at 97. The subsequent discussion focused on the reliability of the confession, and the Court particularly noted that the state had relied on the confession during the codefendant's earlier trial. Again calling attention to the "unique circumstances" of the case, the Court concluded by stating that "the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id.*

Those circumstances demonstrate to me that *Green* is a species of "shocks-the-conscience" opinion. The Court simply was not going to let the state of Georgia get away with that approach in a death-penalty case. Thus, I am not persuaded that *Green* resolves whether certain alibi evidence is relevant and must be admitted pursuant to the Eighth Amendment. That holding would have been much more controversial and, for the Court's purposes in *Green*, was unnecessary.

Outside of its troubling reliance on *Green*, the majority faces an additional problem: Supreme Court cases discussing "residual doubt" arguments strongly suggest that alibi evidence is not relevant to a "circumstance of the offense" and, therefore, the Eight Amendment does not require its admission.

In *Lockhart v. McCree*, 476 US 162, 106 S Ct 1758, 90 L Ed 2d 137 (1986), the Court held that it was consti-

tutionally permissible to exclude jurors who objected to imposing the death penalty prior to the guilt-phase of defendant's trial. To support that holding, Justice Rehnquist cited capital defendants' interest in having a unitary jury to which they could argue "residual doubt." *Id.* at 181. In dissent, Justice Marshall disparaged the Court's concern with the defendant's ability to argue residual doubt. He stated that "this case will stand as one of the few times in which any legitimacy has been given to the power of a convicted capital defendant facing the possibility of a death sentence to argue as a mitigating factor the chance that he might be innocent," and he further noted that the Court had denied *certiorari* in state cases that had refused to allow defendants to make residual doubt arguments during capital sentencing proceedings. *Id.* at 205-06 (Marshall, J., dissenting). Justice Marshall (who was no advocate of the death penalty) did not even cite *Green*, which he certainly should have done, if that case stood for the proposition for which the majority now cites it. More fundamentally, as Justice Marshall's dissent makes clear, it is difficult to see how a court that was reluctant to give any legitimacy to capital defendants' residual doubt arguments as of 1986 could have concluded seven years earlier that the Eighth Amendment required evidence intended to raise residual doubts to be admitted at the penalty phase.

As I have noted, *Franklin* confirms that impression. In *Franklin*, the plurality suggested in the strongest terms that a defendant had no constitutional right to argue, during the penalty phase, that the defendant's life should be spared because there was a possibility that he was innocent:

"At the outset, we note that this Court has never held that a capital defendant has a constitutional right to an instruction telling the jury to revisit the question of his identity as the murderer as a basis for mitigation. Petitioner suggests that our discussion of the 'residual doubt' question in [*Lockhart*] supports his position that he has such an entitlement. * * * But all that this aspect of the *Lockhart* opinion stands for is the simple truism that *where* 'States are willing to go to allow defendants to capitalize on "residual doubts," such doubts will inure to the defendant's benefit.' *Lockhart* did not endorse capital sentencing schemes which permit such use of 'residual doubts,' let alone suggest that capital defendants have a *right* to demand jury consideration of "residual doubts" in the sentencing phase. Indeed, the *Lockhart* dissent recognized that there have been only a 'few times in which any legitimacy has been given' to the notion that a convicted capital defendant has a right to argue his innocence during the sentencing phase. The dissent also noted that this Court has not struck down the practice in some States of prohibiting the consideration of 'residual doubts' during the punishment trial.

"Our edict that, in a capital case, '"the sentencer * * * [may] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense,"' in no way mandates reconsideration by capital juries, in the sentencing phase, of their 'residual doubts' over a defen-

> dant's guilt. Such lingering doubts are not over any aspect of petitioner's 'character,' 'record,' or a 'circumstance of the offense.' This Court's prior decisions, as we understand them, fail to recognize a constitutional right to have such doubts considered as a mitigating factor."

Franklin, 487 US at 172-74 (footnotes and citations omitted) (emphasis in original).

Justice O'Connor would have reached the constitutional issue directly and precluded any consideration of residual doubt as a mitigating factor. *Id.* at 187 (O'Connor, J., concurring) ("Our cases do not support the proposition that a defendant who has been found to be guilty of a capital crime beyond a reasonable doubt has a constitutional right to reconsideration by the sentencing body of lingering doubts about his guilt.").

I acknowledge that *Franklin* and *Lockhart* do not dictate the outcome here. *Lockhart*'s discussion is *dicta*, and a strict view of *Franklin*'s actual holding is that a defendant does not have a constitutional right to a *jury instruction* specifically calling attention to any lingering doubts about defendant's guilt. Neither case delineates the scope of *evidence* that a jury must be allowed to consider at the penalty phase.

Nevertheless, *Franklin* and *Lockhart* shed light on the Court's view of whether evidence suggesting that defendant may be innocent is relevant mitigating evidence under its interpretation of *Lockett* and its progeny. *Franklin* suggests that, just as residual doubt is not a constitutionally mandated mitigating factor that a jury must be allowed to consider, the Court also would hold that evi-

dence intended to raise residual doubts about the defendant's guilt is not relevant to any constitutionally mandated mitigating factor. In other words, given that the Court has allowed states to bar residual doubt *arguments*, it appears to follow ineluctably that, consistent with the Eighth Amendment, the Court would allow states to exclude *evidence* that is relevant only because it would bolster those arguments — that is, evidence intended only to challenge the accuracy of the underlying guilty verdict.

I therefore disagree with the majority's attempt to minimize the significance of *Franklin*. 336 Or at 563 n 30. *Franklin* is not simply a jury instruction case, as suggested by the majority. Rather, by discussing the scope of what constitutes a "circumstance of the offense," a majority of the Court necessarily communicated its view regarding the relevance under the Eighth Amendment of evidence intended to raise doubts about the accuracy of the guilty verdict. Because it suggests that such evidence is not "relevant mitigating evidence" as understood by the Court, *Franklin* cannot be dismissed so easily.

Other than that footnote, the majority does not address the concept of residual doubt. As I understand its view, the majority today holds that, as a matter of federal constitutional law, defendant's alibi evidence must be admitted as relevant to the mitigating factor of "circumstances of the offense," but the opinion need not and does not decide that the Eighth Amendment requires a jury to consider, or a defendant to have the opportunity to raise, any residual doubts about the defendant's guilt at the penalty phase. I do not share that view of either the correctness or scope of the majority's holding.

In order to be admitted, the defendant's alibi evidence must be "relevant mitigating evidence."[33] *Eddings*, 455 US at 114. In my view, the alibi evidence in this case is "relevant" and "mitigating" only in the sense that it challenges the accuracy of the underlying guilty verdict. It is intended to create or play upon any lingering doubts that the jury might have about the evidence that was used to convict the defendant. The alibi evidence does not describe the reason that defendant committed the offense, his conduct during the offense, his relative participation in the offense, or any other fact or circumstance regarding the offense itself that would reduce his moral responsibility. In fact, the proposed testimony quite literally does not say anything about *defendant's* offense at all.[34] *See Lockett*, 438 US at 604 n 12 (stating that a court may exclude, as irrelevant, "evidence not bearing on the defendant's character, prior record, or the circumstances of *his offense*") (emphasis added); *see also Blystone v. Pennsylvania*, 494 US 299, 304, 110 S Ct 1078, 108 L Ed 2d 255 (1990) ("[The death penalty in Pennsylvania] is imposed only after a determination that the aggravating circumstances outweigh the mitigating circum-

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[33] As noted, the majority correctly holds that the scope of mitigating evidence relevant to the fourth question is coextensive with what is required to be considered under the Eighth Amendment.

[34] Indeed, it is conceivable that, after this opinion, scientific evidence challenging the accuracy of eyewitness testimony or fingerprint evidence admitted during the guilt phase could be considered relevant to a "circumstance of the offense."

stances present in *the particular crime committed by the particular defendant*, or that there are no such mitigating circumstances. This is sufficient under *Lockett* and *Penry*.") (emphasis added). Rather, the alibi evidence's only relationship to the offense is temporal, and its relevance is only to establish that, in fact, defendant committed no offense at all.

The proposed testimony, therefore, is distinguishable from the evidence offered in *Lockett*, *Bell*, and *Green*. In those cases, the evidence concerned facts about the commission of the crime. *See, e.g.*, *Bell*, 438 US at 642 (holding that the Eighth Amendment required consideration of "*the particular circumstances of [defendant's] crime* and aspects of his character and record as mitigating factors" (emphasis added)); *see also Woodson v. North Carolina*, 428 US 280, 304, 96 S Ct 2978, 49 L Ed 2d 944 (1976) (stating that "circumstances of the *particular offense*" are "a constitutionally indispensable part of the process of inflicting the penalty of death" (emphasis added)). As those cases demonstrate, the purpose of requiring consideration of the "circumstances of the offense" is to allow the jury to decide whether the relative heinousness of the defendant's crime merits the death penalty.

In the present case, the alibi evidence is not related to any mitigating fact that informs the jury's consideration of the severity of the crime. Rather, the evidence is a naked collateral attack on the sufficiency of the evidence supporting defendant's conviction. Regardless of the merits or effectiveness of that approach, *Franklin* strongly suggests that the state does not violate the

Eighth Amendment if, during the penalty phase, it prohibits arguments or evidence intended to demonstrate that defendant is, in fact, innocent.

This defendant has been adjudged guilty of the two murders in question. Whatever the concept of "any aspect of the defendant's character or background, or * * * circumstance of the offense" may encompass, I cannot in reason believe that the Supreme Court, when faced with the issue directly, would hold that it encompasses revisiting the issue of guilt or innocence of the underlying offense.[35] The majority's contrary conclusion is wrong.

I respectfully dissent.

Carson, C. J., joins in this separate opinion.

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[35] The foregoing point is made even more forcefully when one considers that revisiting the issue of guilt or innocence *is* permitted in specified circumstances, such as (1) the discovery of new evidence (if that is what happens) (ORS 136.535; ORCP 64 B(4)); (2) post-conviction proceedings, where it is alleged that counsel failed to perform adequately and, had counsel done so, evidence of innocence would have been discovered (ORS 138.510 to 138.686); or (3) executive clemency or pardon.

IN THE SUPREME COURT OF THE
STATE OF OREGON

STATE OF OREGON, Plaintiff on Review, v. RANDY LEE GUZEK, Defendant on Review.	Deschutes County Circuit Court No. 87-CR0373TM SC S45272 ORDER DENYING PETITION FOR RECONSIDERATION

Upon consideration by the court.

The court has considered the petition for reconsideration and orders that it be denied.

Dated this 8th day of September 2004.

/s/ Wallace P. Carson Jr.
WALLACE P. CARSON, JR.
CHIEF JUSTICE

Kistler, J., not participating

c: Rolf C. Moan
Holly Ann Vance
Robert B. Rocklin
John Kevin Hunt
Richard L. Wolf
Randy Lee Guzek

ORIGINAL

Supreme Court, U.S.
FILED
MAR 9 - 2005
OFFICE OF THE CLERK

Case Number: 04-928

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 2004 TERM

STATE OF OREGON,

PETITIONER,

VS.

RANDY LEE GUZEK,

RESPONDENT.

SUPPLEMENTAL APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

Richard Lewis Wolf
*Richard L. Wolf, P.C.
12940 NW Marina Way
Portland, Oregon 97231
(503) 384-0910
Counsel of Record for Petitioner Guzek

John Kevin Hunt
19093 South Beavercreek Road
PMB No. 167
Oregon City, Oregon 97045
(503) 650-7782
of Counsel for Petitioner Guzek.

(1973) (Supreme Court has been "particularly suspicious of state trial roles which provide non-reciprocal benefits to the State when the lack of reciprocity interfers with the defendant's ability to secure a fair trial.") This denial of due process was axacerbated by failing to give Appellant's alternative instructions concerning consecutive sentences, which were requested in an attempt to mitigate that harm

For the foregoing reasons, Appellant's sentences of death should be vacated.

ASSIGNMENT OF ERROR NO. 16

The trial court erred in denying Appellant's motion to exclude testimony by transcript, in denying Appellant's motion to strike the transcript testimony of Mark Wilson and Donald Ross Cathey, and in allowing such testimony to be read by surrogates to the jury.

ASSIGNMENT OF ERROR NO. 17

The trial court erred in allowing evidence of the plea agreements of Mark Wilson and Donald Ross Cathey before the jury.

ASSIGNMENT OF ERROR NO. 18

The trial court erred in excluding testimony and evidence impeaching the transcript testimony of Mark Wilson and Donald Ross Cathey.

ASSIGNMENT OF ERROR NO. 19

The trial court erred in excluding any defense evidence of alibi or other evidence tending to negate guilt, in answer to and in impeachment of the transcript testimony of Mark Wilson and Donald Ross Cathey

Pertinent Portions of Record

Appellant incorporates, for purposes of these assignments of error the relevant portions of the record in support of his Assignments of Error Nos. 10, 11, 13, 14, and 15. Appellant further relies upon the following pertinent portions of record.

On May 20, 1997, Appellant filed a *Motion to Exclude Testimony by Transcript*, together with a supporting legal memorandum, seeking to exclude the testimony by transcript of co-defendants Mark Wilson and Donald Ross Cathey, asserting a lack of statutory authority for such testimony, that such testimony would deny Appellant his federal and state confrontation rights, and that such procedure would violate the Due Process Clause. [Case Register: Event No. 590; App. I:1-14]. This motion was denied by order dated September 11, 1997. [App. I:33].

On October 9, 1997, Appellant moved the court for an order striking the previous testimony of Donald Ross Cathey and Mark Wilson, together with a memorandum in support and copies of the plea agreements of Wilson and Cathey. [App. I:15-32]. The motion was denied by an order dated October 9, 1997. [Case Register: Event Nos. 738; 749; App I:33].

At trial, Appellant offered, as offers of proof, denied by the court, the following statements in evidence for purposes of impeaching the surrogate transcript prior testimony of Mark Wilson and Donald Ross Cathey:

> A. **Affidavit of Deborah L. Tuthill**, recounting an interview of co-defendant Cathey by her at Oregon State Penitentiary on June 19, 1991. Ms. Tuthill averred that during that interview, Mr. Cathey told her that he does not know specifically who planned the Leora Waite burglary; that it may have been his idea originally, but that he genuinely did not recall. Ms. Tuthill further averred that Mr. Cathey was sure that he had no intention of killing Ms. Waite; rather his intention was to knock her out. Mr. Cathey also said, according to Ms. Tuthill's affidavit, that after it was

deemed unrealistic to continue with the Waite burglary, it was mutually agreed that the group (Messrs. Guzek, Wilson and Cathey) would go to Houser house. Mr. Cathey reportedly told Ms. Tuthill that there was no ring leader or any one person in charge; rather the activity was mutual. Ms. Tuthill's affidavit further recited that Mr. Cathey told her that there had been no plan or prearrangement to kill the Housers and that their intention was to rob the house. Mr. Cathey reportedly told Ms. Tuthill that Randy Guzek at no time told Mark Wilson to "Do it!", but rather the shooting "just started." Mr. Cathey added, according to Ms. Tuthill, that from his vantage point, he could see Mrs. Houser at the top of the stairway seconds before the shooting began. " [Case Register, Event Nos. 838, 839].

B. **Memorandum of Defense Investigator David Rogers**, dated August 20, 1997, recounting several conversations he had with Mark Wilson at the Oregon State Penitentiary. According to Mr. Rogers' memorandum, Mr. Wilson told him the following: Wilson and the Appellant began committing burglaries while they were still in high school. They began using methamphetamine, and that usage escalated. Wilson was a good student who began dozing off in class due to methamphetamine use. Wilson had been a cadet at the police department. He eventually experienced a deterioration of his body. Wilson and Appellant's first burglary was of a residence in which they had previously attended a party. While there, they observed coins. They returned later and stole the coins. Joel Guzek, Appellant' father, assisted them with that burglary. Mark and Randy committed many burglaries. Neither of them was the leader, there was no leader. Proceeds of the burglaries went to Appellant's father. Appellant and Wilson began carrying guns, but Wilson did not know why they did so. Regarding the Housers, there was not any plan to kill them, and Wilson cannot recall if Appellant really said "Do it!" regarding the shooting of Rod Houser at his front door. [*Id.*]

C. **Deposition of Mark James Wilson.** On April 16, 1993, in the Marion County Circuit Court Case Mark James Wilson, Petitioner v. Manfred Maass, Superintendent, Oregon State Penitentiary, Defendant; No. 91-C10468. In the deposition, Wilson made numerous comments concerning the Houser homicides. Among the statements, were assertions that Wilson did not recall shooting anybody twenty times. He remembered pulling the trigger once outside the house and once inside the house. He did not remember what his state of mind was at the time of the homicides. He was really bothered because he lacked any idea of what was going through his mind at the time of the homicides. He did not specifically know that the gun (used to shoot Rod Houser) was loaded. He had a gun every time they (presumably meaning Wilson and Appellant) committed burglaries. Wilson did not think he ever thought about using the guns during the burglaries. He does not know what his frame of mind was as far as the murder [sic] committed that night. He believed he was

mislead by his trial attorneys, and that if he had known the Parole Board would deny him parole forever, rather than his being definitely released at age 58, he may not have entered into the plea bargain and instead have gone to trial or accepted a death sentence. [Deposition of Wilson, at 8-10, 40-42; Case Register: Event Nos. 838, 839].

D. **The live testimony of Rachel Prudence Elaine Carlson.** Ms. Carlson was an inmate at the Oregon Women's Correctional Center (OWCC). While there, she met Mark Wilson. Ms. Carlson was a legal assistant at OWCC at the same time Wilson was a legal assistant at Oregon State Penitentiary (OSP) which is located directly behind OWCC. They met through daily phone calls and letters. Ms. Carlson did not know Wilson prior to her incarceration.

Eventually, Carlson and Wilson's legal/business relationship evolved into a "social" relationship. They began writing as "pen pals," writing back and forth to each other on a personal level. The telephone calls became more "friendly."

Shortly after Memorial Day, 1997, during one of their telephone calls, Ms. Carlson discussed with Wilson what she had heard about the instant cause, whereupon Wilson characterized her statements as "vicious rumors." Wilson then wrote her a letter about the crimes.

In their first phone call discussing the crime, Wilson became very angry, swearing a lot. He was unhappy with Carlson for listening to anyone about the case. Wilson's follow-up letter was more detailed as far as information about the crime.

Wilson said it was a "burglary that had gone bad." Wilson wrote to Carlson that he had not killed two people, but only one; he gave a brief history of his methamphetamine use starting in January, 1987, through February when he got suspended from school for "doing lines" in the back of his English class, through April when he said he "packed some kind of gun." He further related that graduation was on June 5, and on June 28, he and Appellant had spent the weekend getting high and "using crank," had gotten bored, and decided to do a burglary. He went onto state that he had killed a man during the burglary. Wilson wrote that the people ended up being home, the burglars panicked and two people were killed. Prison officials were disturbed by the letter to Ms. Carlson and interviewed her about it. The letter itself was offered as Defense Exhibit No. 347.

(10/27/97, Tr. 60-67).

E. **Testimony of Lynn Fredrickson**, Lead Detective investigating the Houser homicides. The Fredrickson offer of proof concerned defense

exhibit 348, a report by Fredrickson prepared November 6, 1987, with an appended school record.

(10/27/97, Tr. 81-82).

F. **Testimony of Defense Investigator David Rogers.** Mr. Rogers had reviewed defense exhibit number 347, ante, specifically a reference in that letter from Wilson to Carlson, regarding a meeting between Wilson and prior defense counsel for Appellant. Rogers testified that he was present at the meeting, in which Wilson indicated that he was inclined to testify on behalf of Appellant.

(10/27/97; Tr. 82-84).

G. **A representation by Appellant's trial counsel** that in a conversation with Wilson's lawyer concerning whether or not Wilson would testify in this trial, that Wilson's counsel advised Appellant's counsel that Wilson did want to assist in any he could, but was going to rely on the advice of his attorney. Secondly, that any conversation between Prosecutor Marquis and Wilson's counsel, discussions were had causing Wilson's counsel to conclude that Prosecutor Marquis was saying that if Wilson testified, and did so differently that he did in the first trial of this cause, that would be grounds to vitiate the (life saving to Mr. Wilson) plea agreement.

(10/27/97; Tr. 84-85).

H. **Testimony of Stephanie Dawn Wilson**, wife of Mark Wilson for four years. Mrs. Wilson met Mark Wilson twice before the crimes were committed, in the company of Appellant. She started correspondence with Wilson in January, 1993. Wilson had discussed the circumstances surrounding his aggravated murder conviction with her several times. Wilson told her that he, Appellant and Cathey had been out committing burglaries and, at one point, ended up at the Housers, where they had gone to commit a burglary, expecting no one to be home, but resulting in the murders. He never told her of any intent among the three of them to kill anyone when they went to the Houser resident. Wilson told his wife that the three of them did not discuss killing the Housers specifically, or any one else specifically. He had been consistent in this story. Wilson also told his wife that he had declined to testify in Appellant's current proceeding, invoking his Fifth Amendment privilege under the advise of his attorney, "because he was not certain that they would not revoke his plea agreement and seek the death penalty against him in a future proceeding."

(10/27/97; Tr. 99-101).

On August 20, 1997, Appellant filed a *Notice of Intent to Rely on Evidence of Alibi as Mitigating Evidence* (Case Register: Event No. 645). The notice recited specific evidence Appellant wished to offer, which Appellant asks this Court to consider as constituting an offer of proof:

> I. **The prior court testimony of Clarence Guzek** (Appellant's grandfather), since deceased, offered to prove that on June 28, 1987, from approximately 9:00 p.m. until June 29, 1987, at approximately 2:00 a.m. Appellant was in the presence of and at the home of Clarence Guzek on Walnut Street in Redmond, Oregon.
>
> J. **The testimony of Kathleen Guzek** (Appellant's mother), offer to prove that on June 29, 1987, she noted that at 2:16 a.m. Appellant asked her to set the alarm clock as he had to get up early for work the next day. The location of this conversation was at Kathleen Guzek's residence on Walnut Street, in Redmond, Oregon. She further would testify that when the alarm awoke her at 4:20 a.m. on June 29, 1987, she woke the Appellant, who was sleeping on a loveseat on the deck of her house.

In support of the foregoing offers of proof, in addition to other grounds, Appellant relied upon his *Memorandum in Support of Admissibility of Mitigating Evidence*, referenced numerous times in the Case Register and recited *passim; See*, for example, 10/27/97 Tr. 104)(App. H:9-14; Case Register: Event Nos. 833, 892, 873, 884).[39]

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39 MR. McCABE: Just so the record is clear, I would assert the same grounds in my memorandum. I'm assuming the court is considering the grounds that I've raised –

THE COURT: You bet. I've got it right in front of me in three copies

MR. McCABE: And it's probably not necessary to put another copy into the record, I would assume?

THE COURT: I wouldn't think so. I think the record, I'm not an appellate court, I don't know what they'll think of this record, but I think, at least for my purposes, its sufficient

MR. McCABE: Okay, so I have, and I do rely on all those cases cited in my memorandum in support of admissibility of mitigating evidence

THE COURT: So noted • • •

THE COURT: Okay, that concludes this offer of proof

The state introduced the plea petitions of Wilson and Cathey as evidence for the jury's consideration. (10/27/97, Tr. 13; State's Exhibits 140, 169, 10/8/97 Tr. 16; App I:21-32). Page 4, subsection (5) of Wilson's plea agreement stated: "In addition, I will be subponaed to testify at any trial of both persons mentioned above, Mr. Guzek being one of them." Subsection (6) stated "If I do not testify truthfully in any trial referred to in (5) above, the State of Oregon and Judge Edmonds will no longer be bound by their previous promises made." (*Id.*; 10/27/97 Tr. 28).

The trial court found that Wilson and Cathey were unavailable to testify, and allowed their testimony to be presented through surrogates, denying Appellant's motion to exclude such testimony by transcript, and to strike same. (10/7/97 Tr. 29).

The trial court ruled inadmissible all of Appellant's offers of proof recited above. (10/27/97, Tr. 14, 78, 79, 80, 82, 85, 103).

The bulk of co-defendants' testimony was summarized in Appellant's brief filed in October, 1989, in his original direct review proceeding. It was also summarized in Assignment of Error No. 10 of his opening brief in *Guzek II*. The version of the homicidal events offered by Wilson and Cathey may be briefly summarized as follows:

> Mark Wilson met Appellant at Redmond High School in November, 1986, and they became good friends. Wilson was a frequent house guest at the Guzek residence on Jackson Street in Redmond and kept a toothbrush and razor there. Appellant and Wilson both worked at Pozzi Windows and frequently rode together. Defendant and Wilson met Donald Ross Cathey on June 5, 1987, through another friend, Willie Stevens. Cathey came to the area from California to visit Stevens around the first part of June, 1987. Appellant, Wilson and Cathey were acquaintances and sometimes did things together.

Wilson related that Appellant's father, Joel Guzek, and his girlfriend, Jill Armstrong, had a plan to steal jewelry from an elderly lady by the name of Mrs. Whaite as one of the last illegal things they did before leaving town. Joel estimated that Mrs. Whaite had approximately $10,000 worth of diamond rings. Wilson got Mrs. Waite address by impersonating an Eagle Crest timeshare salesman and asking to send her some literature. Appellant and Wilson drove to the area and attempted to find the house. Wilson consulted an encyclopedia and called several chemical companies to find out about chemicals that would knock a person out.

Appellant, Wilson and Cathey spent June 28, 1987, together swimming and riding Wilson's quadrunner at "The Cove" and Climb Falls. Robin Martin saw the three at Climb Falls and estimated that they left between five and six p.m. Appellant left before Wilson and Cathey did to go see a girlfriend. Wilson and Cathey drove to Crooked River Ranch, then drove down Lower Bridge Road following two attractive young ladies in a Mini Blazer with jet skis. On the way, Cathey saw a house on a hill and said "this looks like a nice house to hit", meaning burglarize. Wilson explained that it was Anne Houser's aunt and uncle's house. Wilson dropped Cathey off in Redmond and returned to his home in Crooked River Ranch.

Wilson returned to Appellant's resident on Jackson Street later that same evening. Appellant decided to get Mrs. Waite's rings for his father. Appellant discussed the plan to burglarize the Waite residence with Cathey and Cathey was "all for it." Wilson and Cathey drove to Crooked River Ranch to steal a headlight switch for Wilson's truck, but a security patrol passed by and Wilson instead went home and borrowed his mother's truck. Donna Wilson saw her son Mark and Cathey as they returned the quad runner and left in her truck about 11:45 p.m. Wilson and Cathey returned to Appellant's residence in Redmond.

After heading out, the three stopped at the Safeway parking lot in Redmond and each snorted one line of crank. They then proceeded toward Bend to carry out the Whaite plan. Cathey and Wilson were to go up to the door and say they were having car trouble and Cathey was to stab Mrs. Whaite with a pocket knife Appellant had given him. Appellant was to act as look out and to help remove valuables after everything was clear. The entire plan was scrapped because there were too many lights on and too many cars in the Whaite's driveway that night. Cathey also said he backed out when they got to the house.

Mark Wilson described the next sequence of events as follows:

"Q [Prosecutor]: Then where did you go after you went past her residence?

A [Wilson]: Well, we headed back up the hill because she lived down next to the river, so we headed up the hill again and headed towards Redmond.

* * * * *

Q: Was there any discussion as to what you were then going to do?

A: At that time we all decided basically that we were, we would like to hit a house, burglarize a house. And we were trying to figure some place to burglarize.

Q: Did you eventually decide on a place to burglarize?

A: Yes, we did. That would have been the Houser residence.

Q: How did you arrive at the decision to, to go to the Houser residence?

A: I believe Ross Cathey brought up the fact as 'what about that house we saw today, Anne Houser's aunt and uncle's ' and, we all thought that would be okay with us to go. I guess that's what we decided on."

The trio returned to the Guzek residence on Jackson Street and Appellant procured a .22 rifle and .32 pistol from the house. They headed for the Houser residence and along the way Appellant stopped to show Wilson how to un-jam the rifle and fired several shots. Appellant and Wilson told Cathey that if anyone was home at the Houser residence they would go in and "get them down." All three went up to door upon arrival. Appellant knocked several times. Rod Houser answered the door in his robe and asked what they wanted. Appellant made up a story about prank phone calls from Anne Houser and Rod started getting irate. At that point, Appellant turned to Wilson and yelled "do it" and Wilson immediately raised the rifle and started firing. Wilson continued to fire at Rod Houser as Rod backed into his house and eventually fell down in front of the front room fireplace. Wilson did not recall how many shots were fired or even that he emptied the clip, but he appeared to fire until the rifle ran out of bullets.

As Wilson was shooting Rod Houser, Appellant ran up the stairs after Lois Houser and three shots were heard by Wilson and Cathey to come from upstairs. Cathey told Wilson "let's make it look like a cult killing." Cathey stabbed Rod Houser in the throat with a pocket knife Appellant had given him earlier that night. Cathey also put a white Bible on top of Rod Houser's body. Wilson and Cathey observed Appellant rummaging through property upstairs and were told by Appellant that he found a .357 magnum in a closet and that he assumed Lois was going for it when he

"hit" her there. Appellant also said he placed a knife in Lois Houser's outstretched hand.

Appellant told Cathey and Wilson to listen for cars and to check downstairs for items of value to take. All three removed property from the residence and stacked it in Donna Wilson's pickup. All three wore gloves. The pickup was 1/2 to 3/4 full with Houser property. The trio left but returned shortly thereafter to retrieve empty shell casings left in the residence. They drove to Ferguson's Market in Terrebonne where Appellant called his father to come and meet them. Joel Guzek and Jill Armstrong arrived a short time later and most of the Houser property was loaded into their Volkswagen Jetta. Appellant told his father the property came from a drug deal gone bad and Wilson and Cathey went along with the story.

Wilson and Cathey each received some money from Appellant, but neither got any of the Houser property. Appellant told Wilson at work later that he (Appellant) had shot Lois Houser in three vital areas. Appellant and Wilson accompanied Joel Guzek and Jill Armstrong to Reno for the fourth of July weekend. Along the way Joel asked Appellant if they thought it was really worth it. Appellant got a big grin on his face and said "yes it was."

At one point after their arrests, Appellant and Cathey were housed in adjacent cells in Deschutes County Jail. Appellant passed a note to Cathey through a hold in the cell wall requesting Cathey to write a note saying that Appellant had nothing to do with the homicides. Cathey and Wilson both reached life-saving plea agreements with the prosecutor and agreed to testify against Appellant. Wilson and Cathey both testified that Appellant killed Lois Houser.

(10/8/97 Tr. 18-85; 10/14/97 Tr. 196-259; 10/15/97 Tr. 30-141).

Relevant Statutory and Constitutional Provisions

Former ORS 163.150(5)(d), now codifiefd as ORS 138.012(b), states, in relevant part:

". . . A transcript of all testimony and all exhibits and other evidence properly admitted in the prior trial and sentencing proceedings are admissible in the new sentencing proceeding. Either party may recall any witness who testified at the prior trial or sentencing proceeding and may present additional relevant evidence."

OEC 802 provides:

"Hearsay is not admissible except as provided by Rules 801-806 (ORS 40.450 to ORS 40.475) or as provided by law."

OEC 803(a) provides:

"(3) **Hearsay exceptions.** The following are not excluded by Rule 802 (ORS 40.455) if the declarant is unavailable as a witness:

> (a) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding . . . if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or re-direct examination."

OEC 804(1) [ORS 40.465(1)] defines "Unavailability as a witness" to include situations in which the declarant:

"(a) Is exempted by ruling of the court on the ground of privilege from tesitfying concerning the subject matter of the statement;

(b) Persists in refusing to testify concerning the subject matter of a statement despite an order of the court to do so;

(c) Testifies to lack of memory of the subject matter of the statements;

(d) Is unable to be present or to testify at the hearing because of death or then existing mental illness or infirmity; or

(e) Is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of an exception under paragraph (b)(c) or (d) of subsection (3) of this section, the declarant's attendance or testimony) by process or other reasonable means."

OEC 806 provides:

"**Attaching and Supporting Credibility of Declarant**. When a hearsay statement, or a statement defined in ORS 40.450(4)(b)(C), (D) or (E) [Rule 801(4)(b)(C), (D), or (E)], has been admitted into evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the hearsay statement of the declarant, is not subject to any requirement under ORS 40.380 [Rule 613] relating to impeachment by evidence of inconsistent statements. If

the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination."

The Legislative Conference Commentary to Rule 806, states in relative part:

"Oregon Rule of Evidence 806 prescribes the manner and limits of impeaching, rehabilitating and cross-examining a hearsay declarant. The rule is based on Rule 806 of the Federal Rules of Evidence. Its reference to ORE 613 replaces a federal reference to the opportunity to deny or explain, and was made necessary by the specific retention of Oregon practice on inconsistent statements in that rule.

Impeachment of absent hearsay declarant. The declarant of a hearsay statement that is admitted into evidence is in effect a witness. Therefore, in fairness, the declarant's credibility should be subject to impeachment (and to rehabilitation) as if the declarant had in fact testified. See Rules 608 to 609-1. There are problems in doing this, however. These arise from the factual differences between hearsay and live witnesses, and between kinds of hearsay, and principly involve the foundational requirement for impeachment by inconsistent statement.

An inconsistent statement of a live witness is inevitably a prior statement, which may be called to the witness' attention in accordance with ORE 613 a statement that is inconsistent with hearsay may be subsequent to it, and cannot be called to the declarant's attention. If the court insists on the usual rules for impeachment by inconsistent statements in a hearsay situation, it must deny the opponent, who is already barred from cross-examination, any benefit of this important technique. The writers favor allowing the inconsistent statement. McCormick, Evidence section 37 at 74 (2nd Ed. 1972); 3 Wigmore, Evidence section 1033 (3d Ed. 1940). The cases, however, are divided. Compare People v. Collup, 27 Cal.2d 829, 167 P2d 714 (1946); People v. Rosoto, 58 Cal.2d 304, 23 Cal.Rptr. 779, 373 P2d 867 (1962); Carver v. United States, 164 US 694, 17 S.Ct. 228, 41 L.Ed. 602 (1897) (allowing impeachment), with Mattox v. United States, 156 US 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895); People v. Heinz, 284 NY 93, 29 NE 2d 483 (1940) (disallowing impeachment).

When the inconsistent statement was made after the hearsay statement, the kind of hearsay involved seems unimportant. The opponent may not have been totally deprived of cross-examination when the hearsay is former testimony, ORE 804(3)(a), but the opponent still was deprived of cross-examination along lines suggested by the trial.

• • • • •

> For these reasons, the Legislative Assembly dispensed with the foundation requirement in all hearsay situations, leaving a rule which is readily administered and fair.
>
> • • •
>
> The above matters had not been addressed in Oregon statute or case law. Federal Ninth Circuit law is in accord, however. McConney v. United States, 421 F.2d 248, 251 (9th Cir. 1969); See also: Carver v. United States, *supra*."
>
> Article I, Section 11 of the Oregon Constitution provides in relevant part:
>
> "In all criminal prosecutions the accused shall have the right . . . to meet the witnesses face to face . . . '"

The Sixth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides that:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . "

ARGUMENT

Standard of Review

This Court reviews the trial court's admission or exclusion of evidence for errors of law. *State v. Pinnell*, 311 Or 98, 109 n. 17 (1991). This Court reviews constitutional issues for errors of law.

Discussion

Because of the close interrelation of the questions presented, Appellant combines his arguments on Assignments of Error Nos. 16, 17, 18, and 19. In *Oregon Evidence*, pp. 521-522 (Butterworth Legal Publishers Second Edition), Laird C. Kirkpatrick discusses the relationship between hearsay and the Confrontation Clause:

> "The hearsay rule and the Confrontation Clause are not co-extensive. Evidence may be admissible under the confrontation clause, yet be inadmissible under the hearsay rule. Conversly, evidence may be admissible as an exception to the hearsay rule under state evidence law, yet be inadmissible under a confrontation clause. *See, Pointer v. Texas,*

380 US 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). . . . If the hearsay declarant does not testify at trial and the out-of-court statement is admitted as an hearsay exception, whether or not the Confrontation Clause depends on whether there is a satisfactory basis for the trier of fact to evaluate the truth of the prior statement and whether the statement possesses sufficient 'indicia of reliability.' *Dutton v. Evans*, 400 US 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970).

As the Supreme Court stated in *Ohio v. Roberts*, 448 US 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980):

> The Court has applied this "indicia of reliability" requirement principally by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the "substance of the constitutional protection." . . . This reflects the truism that 'hearsay rules and the Confrontation Clause are generally designed to protect similar values," *California v. Green*, 399 US at 155,' stem from the same roots. *Dutton v. Evans*, 400 US 74, 86 (1970). It also responds to the need for certainty in the work a day world of conducting criminal trials.
>
> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then though, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.'

As the quoted statement indicates, if the declarant is shown to be unavailable and the statement satisfies a 'firmly rooted' exception to the hearsay rule, compliance with the Confrontation Clause is almost certain to be found. If no showing is made of the unavailability of declarant . . . or if the hearsay exception is not 'firmly rooted' there is greater uncertainty regarding whether the Confrontation Clause is satisfied."

On Page 523, Kirkpatrick compares the state and federal confrontation provisions and states that:

> "To date the Oregon Supreme Court has tended to adopt the precedents of the United States Supreme Court 'in determining what constitutes unavailability of a hearsay declarant and what constitutes adequate indicia

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> of reliability of hearsay declarations to satisfy our state constitutional confrontation clause.' *State v. Campbell*, 299 Or 633, 648, 705 P2d 694, 703 (1985)."

The United States Supreme Court has recently ruled that statements of co-defendants, against their own penal interest, which inculpate the defendant on trial, may not be admitted against the defendant on trial if that defendant has no opportunity to cross-examine; doing so would violate the federal Confrontation Clause, because statements against penal interest are not "firmly rooted" and are inherently suspect. *Lilly v. Virginia*, 527 US 116, 119 S.Ct. 1887, 144 LEd2d 117 (1999). *See also*: *Gray v. Maryland*, 523 US 185, 118 S.Ct. 1151, 140 LEd2d 294 (1998).

Nonetheless, Appellant urges this Court to re-examine the issue, both because Appellant believes that ORS 138.012(2)(b) on its face by permitting the state to substitute surrogate testimony by transcript, is unconstitutional; additionally, Appellant contends that doing so in this case violated his state and federal constitutional rights.

ORS 138.012(2)(b) on its face, permits the state to substitute the surrogate testimony by transcript of the co-defendants from Appellant's first trial in lieu of live testimony, and the statute facially allowed this to occur in lieu of the state producing the witness in the courtroom to show unavailability, and without requiring the state to show that the Appellant "had an opportunity and similar motive to develop the testimony by direct, cross, or re-direct examination." Here, both Wilson and Cathey were produced (Wilson by telephone). Cathey was adamant he would not testify under any circumstances. Wilson invoked his Fifth Amendment privilege against self-incrimination, because, as explained by his attorney, he had a federal *habeas corpus* proceeding pending. The trial judge, however, did not explicitly order Wilson and Cathey to testify.

It is Appellant's position that ORS 138.012(2)(b) as it was applied in this trial, is in conflict with the hearsay rules of the Oregon Evidence Code and violates the state and federal provisions concerning the use of former testimony as an exception to the hearsay rule, thereby also violating the state and federal Confrontation Clauses. No former testimony should have been presented in Appellant's trial, notwithstanding the real or purported "unavailability" of the witnesses.

The hearsay exception to the admissibility of former testimony permits the admission of former testimony only in those situations where the parties at the prior proceeding had a "similar motive" to examine the witnesses as they would if the witness was produced life at the current proceeding. ORS 138.012(2)(b), violates the state and federal Confrontation Clauses unless it is rooted in a well-recognized hearsay exception. The state cannot demonstrate that any former testimony fell inside a firmly rooted exception to the hearsay rule, by virtue of *Lilly v. Virginia, supra*. The state, in order to do so, would have to demonstrate that the parties at Appellant's first trial had "similar motives" to examine the witnesses, as they would have at the trial in the present hearing.

ORS 163.150 provides the sentencing scheme in a death penalty case. Appellant was first tried in 1988. The testimony of the witnesses the state offered through a surrogate was transcribed in 1988. At the time of Appellant's 1988 trial, the jurors sitting in the sentencing hearing deciding whether or not death should be imposed on a person convicted of aggravated murder had to resolve only three issues: (1) Did the defendant deliberate; (2) Would the defendant be dangerous in the future; and (3) Was the defendant's conduct in the killing of the deceased unreasonable in response to

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provocation, if any provocation existed. The statute permitted the jury to consider mitigating evidence, but only with regard to the three questions. In fact, the statute itself limited mitigation to only the future dangerousness question. The scheme did not permit a jury to vote against a sentence of death on the basis of mitigating evidence, if the mitigating evidence did not apply to the three questions set out in former ORS 163.150(b), or by the statute's terms to the second question only.

In *State v. Wagner*, 305 Or 115 (1988), ("*Wagner I*") the Oregon Supreme Court held that Oregon's death penalty scheme was constitutional. The defendant in *Wagner I*, like the Appellant in this case, contended that the scheme violated the United States Constitution because the jury was not presented with the issue of mitigation as a basis for a life sentence if the mitigation did not relate to the three death questions. The Oregon Supreme Court held that no fourth question presenting such consideration was permitted under the statute. As a result of the holdings of the Oregon Supreme Court and the judge at Appellant's first trial, there was no issue before the jury that sentenced Appellant the first time concerning mitigating evidence that did not relate to the three death questions.

In 1989, the United States Supreme Court decided *Penry v. Lynaugh*, 492 US 302 (1989). *Penry* concerned a Texas case. In 1988, the death penalty statutes in Texas and Oregon were almost identical. *Penry* held that the Texas trial court erred when it limited the mitigating evidence a jury could hear only to evidence that was relevant to the resolution of the three death questions. The United States Supreme Court held that the Eighth Amendment to the United States Constitution was violated when the jury was prevented from using mitigating evidence when it had to do with the

issues other than those presented in the three death questions, in deciding whether the death penalty should be imposed. As a result of *Penry*, Oregon's death penalty statute was legislatively and judicially amended. A "fourth question" has been added to the statutory scheme. That question asks jurors to decide whether a death sentence should be imposed. The amended statute tells jurors that, in determining that issue, they are to answer the question "no" if, considering any aspect of the defendant's character or background, or any circumstances of the offense, and considering victim impact evidence and any aggravating evidence, that a sentence of less than death would be appropriate.

In *United States v. Powell*, 894 F2d 895 (7th Cir.1990), Defendant Powell argued that the trial court had committed error when it excluded the transcript of the guilty plea hearing testimony of a witness whom the defense wished to call, who invoked the Fifth Amendment privilege against self-incrimination at the defendant's trial. In holding that the trial court had not committed error, the Seventh Circuit explained that the witness was unavailable within the meaning of Rule 804 of the Federal Rules of Evidence. The court then pointed out that in order to have the transcript of the prior testimony admitted under the Federal Rules of Evidence involving the hearsay exception for former testimony, FRE 804(b)(1), which is identical to OEC 804(b)(1), it was necessary to show that the prosecutor had a similar motive to interrogate the witness at the guilty plea hearing as he would have had at the defendant's trial. The Seventh Circuit rejected the defendant's contention that the prosecution had a similar motive, stating:

> ". . . The prosecution's motive at a guilty plea hearing is to assure that the plea is voluntary and that a factual basis exists for it . . . This responsibility, moreover, rests primarily with the trial judge . . . Here, although Heet denied it at his guilty plea hearing that he conspired with

> Powell and Saudy, he admitted to conspiring with others in committing the offenses in Counts One and Two of the Indictment. Thus, the government did have incentive to pursue the issue of Powell's involvement." *Id.*, at 901.

In the case at bar, the Oregon Supreme Court had held in *Wagner I*, *supra*, that Oregon's statute did not contain a fourth question that would present an issue to the jury concerning mitigating circumstances that did not bear on the three death questions in the 1988 statute. It is this very failure of the 1988 statute to contain a "fourth question" that resulted in the reversal of Appellant's death sentence by the Oregon Supreme Court. *Guzek I*, 310 Or 299 (1990). As in *Powell*, Appellant's attorneys would not have had any incentive to introduce mitigating evidence that did not bear on the three death questions when they examined the witnesses in Appellant's first trial. In fact, in 1988, such evidence would have irrelevant to any of the issues before the jury and could have conceivably been subject to a proper objection or mistrial motion.

This Court has explained that " 'Opportunity' in the context of OEC 804(3)(a) refers to the legal or practical hurdles that would impede the examiner if the examiner were motivated to develop it, *e.g.*, witness asserted a privilege to prevent cross-examination or impeaching documents were not available." *State v. Pinnell*, 311 Or 98, 116 n.27 (1991). In Appellant's case, the opinion of this Court in *Pinnell*, would provide a legal barrier to inquiries concerning mitigating evidence that was not relevant to the three statutory death issues in effect at Appellant's first trial. In *Pinnell*, *supra*, 311 Or at 166 n. 28, this Court stated that " 'motive,' in the context of OEC 804(3)(a), refers to those tactical and strategic considerations that might reasonably influence the direction and extent of counsel's development of the testimony." Similarly, Appellant's attorney's

knowledge – that the Oregon Supreme Court, on February 26, 1988 (while Appellant's first trial was underway)40 had held that there was no provision in the Oregon death penalty statute for a jury to decide against imposing a death sentence because of mitigating factors not related to the three statutory questions – would influence the attorney's strategy and tactics. The attorney would not ask questions which he knew related to irrelevant issues because he would expect objections by the prosecution to be sustained and because of ethical duties to avoid attempting to introduce improper evidence into a legal proceeding.

In any event, the death penalty scheme, as it existed in 1988, provided no motive for Appellant to inquire of any of the witnesses (Wilson, Cathey) with regard to any general mitigating circumstances.

Dayton Leroy Rogers was charged in one indictment with the murder of decedent Smith. In another indictment, he was charged with the murder of six other women. Rogers was tried first for the murder of Smith. He was found guilty of aggravated murder, but the jury answered "no" to the question "Is there a probability that the defendant, Dayton Leroy Rogers, would commit criminal acts of violence that would constitute a continuing threat to society?" As a result, Rogers did not receive the death penalty for the murder of Smith.

Prior to his trial for the murder of the six women, Rogers filed a motion to declare him ineligible for the death penalty on the grounds that the jury's verdict of "no" in the Smith murder trial precluded the state from re-litigating the issue of his future

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40 Appellant's verdict of guilty on all nine counts was returned on March 3, 1988 [Case Register Event No. 168]

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dangerousness in the trial for the murders of the six women. This Court rejected Rogers' argument because:

> "The issue presented by the second question in the present case differs from the second-question issue in the Smith case, because the sentencing jury in each case had to determine whether, based on everything in defendant's life to that point in time (including 'the extent of the mental and emotional pressure under which the defendant was acting at the time the killing was commited') defendant likely would be dangerous in the future . . . The trial in the present case took place nearly one year after the Smith homicide trial. Because everything that has occurred in a defendant's life may be relevant to a determination of that defendant's future dangerousness, the second-question determination necessarily incorporates a temporal element. The jury must determine a defendant's future dangerousness from the day on which the jury makes its determination forward, based on the defendant's life from that day backward. The year of defendant's life between the two trials and defendant's subsequent conviction in the guilt phase of this case had not yet occurred at the time the Smith homicide jury rendered its verdict." *State v. Rogers*, 313 Or 356 , 376-77 (1992) (*Rogers II*).

The holding in *Rogers II* affects Appellant's case. Appellant did not have an opportunity or motive to examine the witnesses at his first trial concerning matters that occurred after the first trial, because those events had not yet occurred. Because Appellant was deprived of this opportunity, the former testimony exception to the hearsay rule does not apply and the transcripts were not admissible under OEC 804. Since the hearsay exception did not permit the admission of the surrogate transcript testimony, both the Oregon and federal Confrontation Clauses were violated because the challenged statements would not satisfy a "firmly rooted" exception to the hearsay rule.

In *State v. Herrera*, 268 Or 349 (1979), this Court reversed a murder conviction for violation of a defendant's confrontation rights.

In *Herrera*, the trial court had allowed into evidence before the jury preliminary hearing testimony of a prosecution witness who testified under immunity, then claimed privilege against self-incrimination at trial when the state broke its promise. The state claimed on appeal that the witness was unavailable and that, therefore, the prior testimony could be introduced. The Supreme Court disagreed stating:

> "The confrontation clause, while guaranteeing the defendant the right to confront a witness face-to-face is not without exception. One such exception under which prior recorded testimony which was subject to cross-examination may be introduced into evidence at trial exists when a witness is truly unavailable to testify at trial * * * However, because of the defendant's strong interest in confronting his accusers and the prosecutor's duty to provide a fair trial for the defendant and to protect the defendant's constitutional rights, the prosecutor's invocation of this exception cannot be granted routinely.
>
> "Before a prosecutor can use prior recorded testimony and thus deprive a defendant of his right at trial to confront his accusers face-to-face, he must first show the trial court that the use of the former testimony is a genuine necessity [* * *] The burden is on the prosecutor to show the trial court what circumstances exist which make use of the prior recorded testimony necessary." State v. Herrera, 286 Or at 355.

This Court in *Herrera* stated the vital interests protected by the right of confrontation. The first vital interest was described as:

> "The right of confrontation protects two vital interests of the defendant. First, it guarantees that the defendant has an opportunity to cross-examine the witness against him in order to test his sincerity, memory, ability to perceive and relate, and the factual basis of his statements. This purpose of confrontation helps to assure the accuracy of the result of the jurors' –determining process by giving the accused an opportunity to test the recollection and conscience of a witness. *Barber v. Page*, 390 US 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968)." *Herrera*, at 353.

In Appellant's case, he had the opportunity to cross-examine the witnesses in the guilt phase and the first penalty phase. However, this Court in *Herrera*, held that the right of confrontation protects a second vital interest which, as in the case of Appellant

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Herrera was violated for Appellant Guzek by admission of the surrogate transcript testimony:

> "The second interest of the defendant which the right to confrontation protects is enabling the defendant to demonstrate to the jury the witness' demeanor when confronted by the defendant so that the credibility of the witness is displayed in the courtroom. This second purpose is no less important than the first." *Id.*, at 354.
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> This Court cited with approval its holding in *State v. Smyth*, 286 Or 293 (1979):
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> "In our system of justice a defendant is not tried on a dossier compiled in prior hearings, no matter how thoroughly and judicially conducted. His guilt must be established at the trial by evidence that convinces a fact-finder beyond a reasonable doubt. But the earlier opportunity to question the witness will often avail little when the jury at the trial sees neither the witness nor the effect of the cross-examination recorded in a cold transcript. As the United States Supreme Court stated in Barber, '[t]he right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weight the demeanor of the witness.' 390 US 725, * * *."

ORS 138.012(2)(b) is facially unconstitutional by providing in relevant part that a "transcript of all testimony and all exhibits and other evidence properly admitted in the prior trial and sentencing proceeding shall be admissible in the new sentencing proceeding . . . ." The language of that statute is flatly irreconcilable with Article I Section 11, the Sixth and Fourteenth Amendments, *State v. Herrera*, *supra*, and *Barber v. Page*, *supra*.

In *State v. Douglas*, 310 Or 438, 444-45 (1990) the Appellant assigned as error the admission of an "unavailable" witness' testimony, which had previously been recorded in that Appellant's preliminary hearing. This Court disagreed with Douglas' contention that the challenged testimony did not meet the requirements of OEC 804(3)(a) that there had been an "opportunity and similar motive to develop the

testimony" in the preliminary hearing This Court found that the security release hearing did meet those requirements.

In *Douglas*, this Court held that Appellant had the opportunity at the security release hearing to cross-examine the witness, and availed himself of it fully. This Court also found that Douglas had a similar motive to cross-examine the witness at the security witness hearing because the parties and the pending charge were identical in the two proceedings. Like the trial court, this Court noted the security release hearing focuses on the question of defendant's guilt. Because release in a murder case will be denied if "the proof is evident or the presumption strong that the person is guilty" (ORS 135.240(2); Or.Const., Art., I Section 14), this Court "presume[d] that defendant sought the hearing because he wanted to be released. That is, not only was the central issue of guilt essentially the same, but also defendant's motive in having that issue decided in his favor at the security release hearing was similar to his motive at trial." *Douglas*, *supra*, at 455.

In *State v. Moen*, 309 Or 45, 84-86 (1990), this Court held that a preliminary hearing provides an opportunity to cross-examine witnesses and suggest the same motive to do so that is similar to the motive at trial. Because of the opportunity to cross-examine the witness at the preliminary or security release hearings, this Court further held that confrontation rights under the state and federal constitutions are not violated by admitting such testimony during the guilt phase of the proceedings. *State v. Douglas*, *supra*, 309 Or at 445-46; *State v. Moen*, *supra*, 309 Or at 86

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As aforestated, the elements of (1) opportunity to cross-examine and (2) motive to cross-examine witnesses Wilson and Cathey were not the same in Appellant's first trial, and his most recent penalty phase hearing on remand.

As noted in the recitation in the pertinent portions of record for these assignments of error, co-defendants Wilson and Cathey, after they had received their life-saving sentences in exchange for their testimony against Appellant in his first trial, made a number of statements which were inconsistent with their prior testimony. These statements concerned whether Appellant was a "ring leader" who had master-minded the murders of the Housers, and ordered the co-defendants to kill. Allowing the transcript testimony permitted the state to present a one-sided theory to the jury, which supported the contention that Appellant was such a manipulative, ring-leading mastermind. Appellant was unable to cross-examine Wilson and Cathey regarding their subsequent inconsistent statements in that regard.

OEC 806 and its commentary make clear that Appellant should have been permitted to meet those claims, made in the absence of Wilson and Cathey at his remand hearing, by impeaching them. The trial court compounded the violation of Appellant's confrontation rights by not allowing the exhibits and testimony offered by Appellant in that regard.

The trial court's failure to admit the subject exhibits and testimony violated a number of Appellant's rights. The evidence is relevant under OEC 401, and was entitled to be presented to the jury pursuant to ORS 163.150(1)(a) because it was "matter . . . relevant to sentence * * *."

The proferred evidence rebutted the state's assertion that Appellant was the "ring leader" of a homicidal gang. The evidence, therefore, was within that which concerns Appellant's character and background, under *Wagner II*, 309 Or 5.

Appellant made specific offers of proof concerning the evidence he wanted to introduce. Oregon jurisprudence provides that an offer of proof can be a recitation by counsel of what the witness would say, or testimony by the witness. *State v. Phillips*, 314 Or 460, 466, 840 P2d 666 (1992); *State v. Affeld*, 307 Or 125, 128, 764 P2d 220 (1988); *State v. Olmstead*, 310 Or 455, 461 (1990).

The trial court's error precluded Appellant from introducing evidence relevant to the appropriate sentence he should receive, contrary to ORS 163.150(1) and OEC 401.

The trial court's rulings also violated Appellant's rights to be heard and to present a defense under Article I, Section 11 of the Oregon Constitution and the Sixth and Fourteenth Amendments to the United States Constitution, as well as his rights to confront and cross-examine the witnesses against him under those same constitutional provisions, and denied him due process. In Appellant's first trial, co-defendants Wilson and Cathey provided the evidence which convicted him and led to his death sentence, in what would have otherwise have been an entirely circumstantial case. The fact that co-defendant Wilson had recanted his testimony, at least partially, with regard to whether Appellant's involvement in the crime was as a ringleader, was extremely relevant and was certainly a mitigating factor. At the very least, it was a subsequent inconsistent statement which would have been very powerful in the impeachment of Wilson's and Cathey's surrogate testimony by transcript.

Allowing the surrogate testimony by transcript of Wilson, while excluding his subsequent inconsistent statements, was an inconsistent ruling. Wilson's statements were inconsistent with his previous testimony, and Wilson had been ruled unavailable as a witness by the trial court. The result of this one-sided set of evidentiary rulings was that the state was granted a non-reciprocal benefit to present unimpeached material testimony which was critical to the jury's determination as to whether Appellant should die.

This controvened the rule of *Wardius v. Oregon*, *supra*, in violation of the due process clause of the Fourteenth Amendment. Further, because Appellant could not have known in his first trial that Wilson would subsequently change his statements, the due process clause was violated for that reason also.

Appellant was, therefore, also denied a reliable adjudication of an appropriate sentence under the Eighth Amendment because the jury was not allowed to consider this evidence in deciding the punishment. *Jurek v.Texas*, 428 US 262, 271 (1976); *Turner v. Murray*, 476 US 28, 33-34 (1986).

Appellant here had "no opportunity to deny or explain" or even impeach the statements of Wilson and Cathey. He could not "appropriately create any other opportunity to meet what was not in the case," *State v Tucker*, 315 Or 321, 353 [Fadely, J., dissenting, citing *Chambers Mississippi*, v. 410 US 284, 302-03 (1973)], when the court not only disallowed his offers of proof concerning Wilson and Cathey, but additionally denied Appellant the right to present alibi evidence to challenge the co-defendants' transcript testimony.

As the United States Supreme Court stated, in overturning the conviction in Chambers:

> "Few rights are more fundamental than that of an accused to put on a fence . . . where constitutional rights directly affecting the ascertainment of [outcome] are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice . . . exclusion of this critical evidence . . . denied . . . fundamental standards of due process. . . .and . . . deprived Chambers of a fair trial." *Chambers*, 410 US at 302-03.

As noted, ante, the plea agreements of Wilson and Cathey were admitted into evidence. Relevant paragraphs of those plea agreements recited that Wilson and Cathey were required thereunder to testify truthfully against Appellant, under the penalty of having their life-saving plea agreements revoked if they failed to do so. Although Wilson and Cathey refused to testify at Appellant's subsequent penalty hearings, the state has never sought to revoke those plea agreements. Nonetheless, their admission before the jury constituted reversable error.

In *State v. Charboneau*, this Court reversed convictions for aggravated murder and murder, where the only eye witness to the murder testified in detail as to Charboneau's personal participation in the murder, and the trial court allowed the state to introduce into evidence the plea agreement of the eye witness which recited the state's belief that the eye witness' representations accurately stated his involvement in the crime. *State v. Charboneau*, 323 Or at 42-43, 50, 913 P.2d 308 (1996).

In *State v. Wilson*, 323 Or 498, 918 P2d 826 (1996), Charboneau's co-defendant's convictions for aggravated murder and murder, of the same victim, were reversed for precisely the same reason.

In *Charboneau* and *Wilson*, this Court noted that the eyewitness whose plea agreement had been introduced by the state, was the only eyewitness to the murder

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who testified in detail as to the defendants' personal participation therein, thereby providing the crucial evidence that tied the defendants to the murder. Under those circumstances, this Court held the error was prejudicial, requiring reversal of the convictions.

This Court based its ruling on the proposition that a "witness' testimony or exhibit may not, explicitly and directly, contain an opinion as to a trial witness' credibility." *Wilson*, 323 Or at 502; *Charboneau*, 323 Or at 48.

Here, the plea agreements comment on Wilson's and Cathey's credibility was a reference to pre-testimonial polygraphs. Appellant urges that admitting into evidence a recitation that Wilson and Cathey must "testify truthfully" concerning Appellant's guilt, is tantamount to such a direct and explicit comment.

Appellant urges this Court to reach the merits on this issue on the grounds that it constitutes "plain error," which is "apparent on the face of the record." ORAP 5.45(2); see also, *State v. Brailey*, 224 Or 1, 9 (1960).

Accordingly, Appellant's rights under the Confrontation Clauses of the state and federal constitutions, and his right to be heard and to present critical evidence as part of a complete defense under Article I, Section 11 and the Due Process Clause, were violated. Therefore, his sentences of death should be vacated.

ASSIGNMENT OF ERROR NO. 20[41]

The trial court erred by denying Appellant's motion to change venue.

Appellant filed a motion for change of venue in November, 1996. (App. J 1-2). Following a January 27, 1997 evidentiary hearing, Appellant's counsel told the court that

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Case Number 04-928

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 2004 TERM

STATE OF OREGON,

PETITIONER,

VS.

RANDY LEE GUZEK,

RESPONDENT.

MOTION TO PROCEED *IN FORMA PAUPERIS*.

The Respondent asks leave to file the attached Brief in Opposition without prepayment of costs and to proceed *in forma pauperis*.

The Respondent has previously been granted leave to proceed *in forma pauperis* in the following courts: Deschutes County, Oregon Circuit Court, Oregon Supreme Court. Respondent also filed a motion to proceed *in forma pauperis* in connection with his own petition for writ of certiorari in this Court and his petition was placed on the docket on December 20, 2004 as No. 04-7698. Respondent's affidavit or declaration filed in support of that motion is attached hereto.

*Richard Lewis Wolf
Richard L. Wolf, P.C.
12940 NW Marina Way
Portland, Oregon 97231-2312
(503) 384-0910
Counsel of Record for Respondent

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SUPREME COURT, U.S.

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, RANDY LEE GUZEK, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$25.00	$ N.A.	$25.00	$ N.A.
Self-employment	$ N.A.	$	$ N.A.	$
Income from real property (such as rental income)	$ N.A.	$	$ N.A.	$
Interest and dividends	$ N.A.	$	$ N.A.	$
Gifts	$ N.A.	$	$ N.A.	$
Alimony	$ N.A.	$	$ N.A.	$
Child Support	$ N.A.	$	$ N.A.	$
Retirement (such as social security, pensions, annuities, insurance)	$ N.A.	$	$ N.A.	$
Disability (such as social security, insurance payments)	$ N.A.	$	$ N.A.	$
Unemployment payments	$ N.A.	$	$ N.A.	$
Public-assistance (such as welfare)	$ N.A.	$	$ N.A.	$
Other (specify):	$ NA	$	$ NA.	$
Total monthly income:	$25.00	$	$25.00	$

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
DEPT. OF CORRECTIONS O.S.P.	2605 STATE ST. SALEM, OREGON 97310	2002 – PRESENT	$25.00
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N.A.			$
			$
			$

4. How much cash do you and your spouse have? $ APPROXIMATELY $20.00
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
N.A.	N.A.	$ N.A.	$ N.A.
		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value N.A.

☐ Other real estate
Value N.A.

☐ Motor Vehicle #1
Year, make & model N.A.
Value

☐ Motor Vehicle #2
Year, make & model N.A.
Value

☐ Other assets
Description N.A.
Value

	You	Your spouse
Transportation (not including motor vehicle payments)	$N.A.	$N.A.
Recreation, entertainment, newspapers, magazines, etc.	$25.00	$
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$N.A.	$
Life	$N.A.	$
Health	$N.A.	$
Motor Vehicle	$N.A.	$
Other:	$N.A.	$
Taxes (not deducted from wages or included in mortgage payments)		
(specify):	$N.A.	$
Installment payments		
Motor Vehicle	$N.A.	$
Credit card(s)	$N.A.	$
Department store(s)	$N.A.	$
Other:	$N.A.	$
Alimony, maintenance, and support paid to others	$N.A.	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$N.A.	$
Other (specify):	$N.A.	$
Total monthly expenses:	$25.00	$

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
N.A.	$ N.A.	$ N.A.
	$	$
	$	$

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
N.A.	N.A.	N.A.

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$ N.A.	$ N.A.
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ N.A.	$
Home maintenance (repairs and upkeep)	$ N.A.	$
Food	$ N.A.	$
Clothing	$ N.A.	$
Laundry and dry-cleaning	$ N.A.	$
Medical and dental expenses	$ N.A.	$

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☒ Yes ☐ No If yes, describe on an attached sheet.

DEATH SENTENCE OVERTURNED ON MARCH 4TH, 2004. IF I'M SENT BACK TO THE COUNTY JAIL, I WILL LOSE MY JOB HERE THAT PAYS $25.00 A MONTH (ON AVERAGE). NO JOBS AVAILABLE AT THE COUNTY JAIL.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? N.A.

If yes, state the attorney's name, address, and telephone number:

N.A.

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? N.A.

If yes, state the person's name, address, and telephone number:

N.A.

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I'VE BEEN INCARCERATED SINCE 1987. WHEN I'M ALLOWED TO WORK HERE IN I.M.U. (SPECIAL HOUSING UNIT), I CAN ONLY MAKE APPROXIMATELY $25.00 A MONTH, WHICH I USE TO BUY ENVELOPES, WRITING PAPER, HYGIENE ITEMS, ETC...

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: MARCH 9TH, 2004

(Signature)

No. 04-928

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF OREGON,

PETITIONER,

v.

RANDY LEE GUZEK,

RESPONDENT.

Petition for Writ of Certiorari to the
Supreme Court of the State of Oregon

RESPONDENT'S BRIEF IN OPPOSITION

RICHARD L. WOLF, P.C.
*RICHARD L. WOLF
12940 NW Marina Way
Portland, Oregon 97231-2312
Telephone: (503) 384-0910

JOHN KEVIN HUNT
19093 South Beavercreek Road
Oregon City, Oregon 97045
(503) 650-7782

Attorneys for Respondent Guzek.

*Counsel of Record

CAPITAL CASE[1]

QUESTION PRESENTED

1.

Petitioner State of Oregon's "Question Presented" asks whether a capital defendant has a right under the Eighth and Fourteenth Amendments to the United States Constitution to offer evidence in support of a residual-doubt claim—that is, that the jury in a penalty phase proceeding should consider doubt about the defendant's guilt in deciding whether to impose the death penalty?

Respondent Guzek does not accept Petitioner's framing of the question presented because this is not a residual doubt case as the Oregon Supreme stated:

> We note that, in *Franklin v. Lynaugh*, 487 U.S. 164, 172, 108 S. Ct.2320, 101 L.Ed 2d 155, *rehearing den*, 487 U.S. 1263, 101 L. Ed 2d 976, 109 S. Ct. 25 (1988); *id.* at 187-88 (O'Connor, J., concurring), a plurality of the Supreme Court strongly suggested, and the concurrence would have held, that the Eighth Amendment does not require an *instruction* that a penalty-phase jury consider any *residual or lingering doubts* remaining from the guilt phase. However, nothing in that decision lessened the direction from *Lockett, Bell, Eddings*, and *Green* that the Eighth Amendment *does* require that a defendant be permitted to *introduce*, and a jury be able to consider, *mitigating evidence relevant to any circumstances of the offense*, such as evidence that would lessen the defendant's culpability in the offense. Simply stated, a "residual" or "lingering doubt[]" remaining from the guilt phase, *Franklin*, 487 U.S. at 174, is qualitatively different from actual "evidence" proffered during the penalty phase.

State v. Guzek, 336 Or. 424, 463, n.30, 86 P.3d 1106, 1128 (2004).

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[1] As noted in Mr. Guzek's *Petition for Writ of Certiorari* at page i, footnote 1, the procedural posture of this case does not appear to strictly comport with the definition of "Capital Case" in United States Supreme Court Rule 14.1(a). Petitioner has (with explanation) affixed the heading "CAPITAL CASE" to his filings in this Court. In contrast, Respondent has – without reservation – captioned its filings as such, in contradiction to its argument that Mr. Guzek's Petition for Writ of Certiorari is not properly before this Court by reason of speculation that Petitioner may not receive a death sentence on his remand to the trial court for a fourth sentencing proceeding, contrary to the result in the three prior sentencing proceedings.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Randy Lee Guzek, asks this Court to deny the petition for a writ of certiorari filed by the State of Oregon which seeks review of one holding in the Oregon Supreme Court's decision in *State v. Guzek*, 336 Or. 424, 86 P.3d 1106 (2004), which vacated a death sentence imposed following a penalty-phase retrial.[2]

REASONS THE WRIT SHOULD BE DENIED

Petitioner State of Oregon asks this Court to grant its petition and review whether a capital defendant has a right under the Eighth and Fourteenth Amendments to the United States Constitution to offer evidence and argument during the penalty phase in support of a residual-doubt claim. Petitioner's framing of the question ignores that the Oregon Supreme Court explicitly acknowledged this Court's plurality ruling in *Franklin* and distinguished Mr. Guzek's case from *Franklin* by stating this was not a residual doubt case. *State v. Guzek*, 336 Or. at 463, n.30, cited *verbatim*, *infra* at page i.

A.

ALTHOUGH THE RULING BELOW WAS INFORMED BY FEDERAL LAW, IT WAS PREMISED ON CLAUSES OF TWO STATE STATUTES.

The Oregon Supreme Court also ruled that Mr. Guzek's grandfather's alibi testimony was required to be admitted pursuant to Oregon Revised Statute 138.012, which provides, in relevant part, that

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[2] Mr. Guzek has filed his own petition for a writ of certiorari, in Supreme Court Case No. 04-7698, on December 7, 2004 and placed on the docket December 20, 2004. Mr. Guzek seeks review of the Oregon Supreme Court's holding that Oregon's death penalty scheme violates the Eighth Amendment Cruel and Unusual Punishment Clause by allowing a sentence of death upon proof less than "beyond a reasonable doubt" concerning the probability a defendant may commit future acts of violence thereby relieving the state of its burden in violation of the Due Process Clause of the Fourteenth Amendment. Mr. Guzek also asks this Court to review whether the Oregon Supreme Court's holding admitting victim impact evidence in the fourth penalty phase proceeding violates the *Ex Post Facto* Clause of the United States Constitution. *See Guzek*, 336 Or. at 447 (so holding).

> "* * * [i]f a reviewing court finds prejudicial error in the sentencing proceeding only, * * * * * [a] transcript of all testimony and all exhibits, and other evidence properly admitted in the prior trial and sentencing proceeding are admissible in the new sentencing proceeding. * * *" [3]

The ruling admitting this alibi evidence was made exclusively under Oregon law without a single reference to any federal constitutional provision. The Oregon Supreme Court ruling admitting the grandfather's alibi evidence simply held:

> Because the analysis of their relevance is different, we address separately the two different types of alibi evidence that defendant sought to present to the jury. The transcript of defendant's grandfather's testimony -- like the transcript of any other witness's testimony -- was relevant and subject to consideration in the penalty phase, regardless of its substance, because it was "previously offered and received" during the trial on the issue of guilt. ORS 163.150(1)(a); *see also* ORS 138.012(2)(b) (if reviewing court vacates death penalty, transcript of all testimony, all exhibits, and other evidence properly admitted in prior guilt and penalty-phase proceedings deemed admissible in remanded penalty-phase proceeding). The trial court therefore erred in sustaining the state's objection to admission of that evidence.
>
> *Guzek III*, 336 Or. at 451.

The dissenting opinion noted that the state neglected to offer briefing on the differing bases of admissibility for the grandfather's alibi evidence and mother's alibi evidence.[4] Therefore, Petitioner State of Oregon is in no position to ask this Court to review the admissibility of the grandfather's alibi evidence, having failed to make any argument in the state court with respect to whether or not the evidence was admissible as a matter of state law, and the Oregon Supreme Court resting its decision squarely on that basis. Consequently,

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[3] Or. Rev. Stat. §138.012(2)(a,b).

[4] n31 For some reason, the state did not, in its extensive briefing in this case, separately discuss either the grandfather's or the mother's testimony. *Guzek III*, 336 Or. at 469.

half of Mr. Guzek's proffered alibi testimony will be admitted in the fourth capital sentencing proceeding pursuant to an independent and adequate state ground regardless of whether the State's petition is granted in this Court. There is simply no federal question raised with respect to grandfather's alibi testimony.

B.

TO THE EXTENT THE SOURCE OF THE STATE APPELLATE COURT'S RULING IS UNCLEAR OR AMBIGUOUS, THE MATTER SHOULD BE REMANDED FOR CLARIFICATION.

Before fully addressing the merits of Petitioner's request for review, it will be indispensably helpful to set forth the complicated and unusual state appellate court record from which this issue arose.

The Oregon Supreme Court's decision holding the alibi evidence admissible, arose from four separate assignments of error, concerning four separate types of evidence, in Mr. Guzek's brief on direct review below from the sentence of death. Mr. Guzek combined his arguments on those four assignments of error, in his brief before the Oregon Court. This was because the primary thrust in all four assignments of error, was that the trial court had erred by (1) on the one hand, admitting the transcript testimony (through surrogate witnesses, *i.e.* actors) of Mr. Guzek's codefendant murderers adduced in the culpability phase of his first trial, pursuant to Or. Rev. Stat. 138.012(2)(b); whereas (2) the trial court did not permit Mr. Guzek to introduce similar forms of evidence in order to impeach that testimony.[5] Several of

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[5] The Oregon Supreme Court accurately summarized this background, and the purposes for which introduction of the disputed evidence was sought, with respect to the non-alibi evidence at 336 Or. at 444-47: inexplicably, however the court claimed that Mr. Guzek's alibi evidence proffer was predicated on it being mitigating evidence concerning the circumstances of the offense. While that argument was preserved, it was not Mr. Guzek's primary assertion, and as the court noted, that assertion was predicated mainly on Oregon statute, that is Or. Rev. Stat. 163.150(1)(b)(D). *Id.* 336 Or. at 450-51.

those items of evidence -- which directly attacked the credibility and veracity of the co-defendants regarding Mr. Guzek's relative culpability for the homicides -- came into existence after his conviction.

Mr. Guzek urged in the state appellate court that it violated his rights under the state evidence code,[6] and under the state and federal constitutional confrontation clauses,[7] to deny him the right to impeach the transcript testimony of the codefendants in that manner.

The four assignments of error, and combined arguments thereon submitted in Mr. Guzek's state appellate brief, are submitted herewith as Supp. App. "A". An examination of that excerpt from Mr. Guzek's brief, makes it entirely clear that he did not primarily rest his claims upon the Eighth Amendment, or upon any purported scope of mitigation controlled solely by that United States Constitutional provision[8].

Mr. Guzek's claims and arguments may be succinctly summarized as follows:

In his capital *Assignment of Error No. 16* he asserted that the trial court erred in denying Mr. Guzek's motion to exclude testimony by transcript of his codefendants (Mark Wilson and Donald Cathey); and by allowing such testimony to be read by surrogates to the jury.

---

[6] Ore. Evid. Code 803(3), 804(1), 806

[7] Or. Const. Art. I, § 11 ("In all criminal prosecutions, the accused shall have the right to *** meet the witnesses against him face to face****"); UWS Const. Am. VI (in all criminal prosecutions, the accused shall enjoy the right *** to be confronted with the witnesses against him ***").

[8] Mr. Guzek did, of course, *raise and preserve* Eighth Amendment claims, but his extensive argument before the Oregon Supreme Court was premised almost entirely upon non-constitutional state legal authority. Nonetheless, by stressing that point herein, Mr. Guzek in no manner waives his right to rely upon such Eighth Amendment authority, and any and all other federal constitutional provisions and jurisprudence, which he raised below. *See, Howeell, supra.* (failure to raise a claim or argument in a brief Opposing a Petition for Certiorari, may operate as a waiver of the opponents right to rely on such authority in the event this Court accepts review on the merits.

Assignment of Error No. 17 : The trial court erred in allowing testimony of the plea agreements of the codefendants.

Assignment of Error No. 18 : The trial court erred in excluding testimony and evidence impeaching the transcript testimony of the codefendants.

Assignment of Error No. 19 : The trial court erred in excluding any defense evidence of alibi or other evidence tending to negate guilt, *"in answer to and impeachment of* the transcript testimony of Mark Wilson and Donald Ross Cathey." (Emphasis added by Mr. Guzek).

These complaints below arose primarily from plea agreements between the state and Mr. Guzek's codefendant's. In exchange for their testimony against Mr. Guzek, the two were spared death sentences, but their plea agreements stipulated that their failure to testify as expected would result in capital prosecution. The two received life sentences with the possibility of parole, in exchange for their live testimony in Mr. Guzek's first trial.

Both codefendants refused to testify in the two subsequent re-sentencing trials. As a result, the transcripts of their prior testimony were read to the juries by surrogates, over Mr. Guzek's objection. In each re-sentencing trial, Mr. Guzek sought to impeach the credibility of the codefendant's hearsay testimony. In his most recent re-sentencing trial, Mr. Guzek sought to do so via the following;

(1) An affidavit of a defense investigator who interviewed Cathey in prison in 1991, which for the first time contradicted much of Wilson's live testimony in the first trial.

(2) Memorandum of a second defense investigator recounting several prison conversations with Wilson, also contradicting much of his own original trial testimony relied upon by the prosecutor in arguing to the jury that Mr. Guzek was the most culpable of the three.

(3) April, 1993 Deposition of Wilson, given in the course of his *habeas corpus* proceeding, therein, Wilson variously claimed memory loss as well as contradicting most of his original trial testimony (even claiming he did not know a rifle was loaded which Wilson previously testified he used to kill a victim in this case with 20 shots.

(4) Live testimony of women's prison inmate who met Wilson in the course of their mutual work as prison paralegals. This female inmate would have related a phone call in which Wilson gave yet another version of the events on the night of the homicides.

(5) Testimony of the lead detective who investigated the homicides, concerning a prior report he prepared in 1987: admission of a school record was sought to impeach this testimony (the detective had died prior to the third re-sentencing trial).

(6) Testimony of a defense investigator who had read a letter written from Wilson to the female prison paralegal regarding willingness of Wilson to testify for Mr. Guzek in a more truthful manner than originally.

(7) Evidence of a conversation between Wilson's lawyer and Mr. Guzek's lawyer regarding Wilson's willingness to testify more truthfully in the third re-sentencing trial.

(8) Testimony of Wilson's ex-wife regarding statements made to her that contradicted Wilson's original trial testimony, as well as his statement to her that he would invoke the Fifth Amendment in the retrial due to uncertainty whether the prosecutor would revoke the plea agreement and subject Wilson to a capital trial if he revealed the actual circumstances of the offense.

(9) The prior testimony of Mr. Guzek's grandfather, since deceased, which tended to establish an alibi for Mr. Guzek during the time period Wilson and Cathey claimed the offenses occurred.

(10) Testimony of Mr. Guzek's mother as to circumstantial evidence that he had been asleep at her residence asleep at the time of the homicides.

Opening Brief *State v. Guzek*, (*Guzek* III) S45272 at pages 326-331. See Supp. App. "A".

The thrust of Mr. Guzek's claims and arguments before the Oregon Supreme Court, was that the refusal of the trial court to admit the foregoing evidence was contrary to his

privileges under the Oregon Evidence Code, and denied him a fair trial by preventing him from impeaching the testimony of the only two percipient witnesses whose highly questionable original testimony led to Mr. Guzek being condemned as the "ringleader" and "mastermind" of the homicides. The proffered evidence also impeached the codefendant's prior testimony in many other respects. Similarly, the alibi testimony impeached the codefendants by tending to prove, at a minimum, that the crimes could not have been committed at the time claimed by the codefendants. While most of these offers of proof related to the "circumstances of the offense" they were not offered as substantive evidence, but rather as impeachment.

Certainly the Eighth Amendment is implicated any time a capital sentencing proceeding is unfair, as noted by Mr. Guzek below. In accordance with well-established Oregon jurisprudence,[9] realizing that his claims could be easily resolved on a sub-constitutional basis, Mr. Guzek extensively briefed his assignments of error under Oregon statutory law, including the Oregon Evidence Code. While he certainly made reference to the Eighth Amendment and relevant case law of this Court, sufficient to preserve such arguments on higher review, it is clear from Mr. Guzek's briefing in this matter that neither party expected the Oregon Supreme Court to make this into a federal case. In light of the foregoing (particularly since the alibi evidence comprised two of several desired items of impeachment of the state's absent, star witnesses) it is easily seen why there is a strong likelihood the Oregon Supreme Court will modify and clarify the basis for it's decision, if

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[9] *See e.g. State v. Kennedy*, 295 Or. 260, 666 P.2d 1316 (1983); (Oregon Supreme Court examines Oregon constitutional claims, only reaching federal constitutional claims when first level of inquiry is inadequate for rendering decision); *State v. Caraher*, 293 Or. 741, 653 P.2d 942 (1982) (Oregon Supreme Court will not resolve claims under state or federal constitution, even if raised thereunder, when such claims may be resolved solely by resort to state statute).

provided an opportunity to do so by remand. Immediately reaching a federal constitutional issue – particularly where an assignment of error was not particularly framed as such – is a clear aberration[10] from the Oregon Supreme Court's longstanding jurisprudential policy. *See*, note 4.

With respect to the ruling admitting the mother's alibi evidence, it bears mentioning that at the time the Oregon Supreme Court handed down the decision in Mr. Guzek's case, it was sitting with only a quorum of five members, rather than a full seven-member court[11]. With respect to the alibi evidence, the decision was 3-2. As a result of the state's failure to address the admissibility of the grandfather's alibi evidence under state law, and because the Oregon Supreme Court was not sitting at full strength when issuing its ruling, the most this Court should do is to remand the case to the Oregon Supreme Court to have it clarify the basis for holding the mother's alibi evidence admissible in Mr. Guzek's fourth re-sentencing proceeding. In accordance with this Court's jurisprudence in such circumstances, the most appropriate disposition would be remand to the Oregon Supreme Court for clarification. *California v.* Krivda, 409 U.S. 33 (1972) (Per Curiam);[12] *see also*, *Enterprise Irrigation*

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[10] For example, with respect to each proffered item of impeachment evidence, the court ruled on sub-constitutional statutory grounds; "* * * defendant argues that his proffered evidence of inconsistent statements by Wilson and Cathey was 'very powerful' impeachment evidence, in other words, that it tended to show that the jury should not trust Wilson and Cathey's transcript testimony about defendant's role in the murders. Because defendant offered his evidence for that purpose, it did not qualify as hearsay, and the trial court erred by excluding it on that basis." *Guzek*, 336 Or. at 449.

[11] Former Justice (now Oregon Governor) Kulongoski, self-recused, having been Oregon Attorney General during much of the latter half of this case's 18-year history. Kislter, J., self-recused, having represented the State of Oregon in proceedings below, *State v. Guzek*, S38455, wherein he appeared at oral argument on behalf of the State of Oregon.

[12] "After briefing and argument, however, we are unable to determine whether the California Supreme Court based its holding upon the Fourth and Fourteenth Amendments to the Constitution of the United States, or upon the equivalent provision of the California Constitution, or both. In reaching its result in this case, the California court cited pertinent excerpts from its earlier decision in *People v. Edwards*, 71 Cal. 2d 1096, 458 P. 2d 713 (1969) (*en banc*), which relied specifically upon both the state and federal provisions. 5 Cal. 3d, at 367, 486 P.

Footnote continued...

District v. Farmer's Mutual Canal Co., 243 U.S. 157, 163-65 (1917).[13] Since Petitioner acknowledges that "this Court has not resolved the precise issue here," and further recognizes that other states and the United States Court of Appeals for the Fifth Circuit have permitted residual-doubt evidence in capital sentencing proceedings (Petition 17-20), this is an appropriate response by this Court given the posture of the case and the shortcomings of Petitioner's presentation of the argument below.

While admission of the mother's alibi evidence appears to be based largely on interpretation of federal constitutional law, the Oregon Supreme Court cautioned:

> We turn to the question of the relevance of defendant's remaining alibi evidence -- specifically, his mother's testimony. The state begins its argument with the unassailable premise that capital penalty-phase proceedings occur only if a jury has found a defendant guilty of the substantive offense. From that, the state urges that we

---

(...continued)

2d, at 1269. Thus, as in *Mental Hygiene Dept.* v. *Kirchner*, 380 U.S. 194, 196-197 (1965), "while we might speculate from the choice of words used in the opinion, and the authorities cited by the court, which provision was the basis for the judgment of the state court, we are unable to say with any degree of certainty that the judgment of the California Supreme Court was not based on an adequate and independent nonfederal ground." We therefore vacate the judgment of the Supreme Court of California and remand the cause to that court for such further proceedings as may be appropriate." *Id.* 409 U.S. at 34-35.

[13] "Thus we are concerned with a judgment placed upon two grounds, one involving a federal question and the other not. In such situations our jurisdiction is tested by inquiring whether the non-federal ground is independent of the other and broad enough to sustain the judgment. Where this is the case, the judgment does not depend upon the decision of any federal question and we have no power to disturb it. *Hammond v. Johnston*, 142 U.S. 73, 78; *Eustis v. Bolles*, 150 U.S. 361; *Berea College v. Kentucky*, 211 U.S. 45, 53; *Waters-Pierce Oil Co.* v. *Texas*, 212 U.S. 112, 116; *Gaar, Scott & Co.* v. *Shannon*, 223 U.S. 468; *Southern Pacific Co.* v. *Schuyler*, 227 U.S. 601, 610. It has been so held in cases where the judgment was rested upon a federal ground and also upon an estoppel. *Pierce v. Somerset Ry.*, 171 U.S. 641, 648; *Lowry v. Silver City Gold & Silver Mining Co.*, 179 U.S. 196. n1 But where the non-federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other our jurisdiction is plain. See *Moran v. Horsky*, 178 U.S. 205, 208; *Creswill v. Knights of Pythias*, 225 U.S. 246, 261. And this is true also where the non-federal ground is so certainly unfounded that it properly may be regarded as essentially arbitrary or a mere device to prevent a review of the decision upon the federal question. *Leathe v. Thomas*, 207 U.S. 93, 99; *Vandalia R.R. Co.* v. *South Bend, ibid.*, 359, 367. But, where the non-federal ground has fair support, we are not at liberty to inquire whether it is right or wrong, but must accept it, as we do other state decisions of non-federal questions. *Murdock v. Memphis*, 20 Wall. 590, 635; *Eustis v. Bolles, supra*, p. 369; *Leathe v. Thomas, supra*; *Arkansas Southern R.R. Co.* v. *German National Bank*, 207 U.S. 270, 275." *Id.* 243 U.S. at 163-65.

> infer that evidence of innocence is irrelevant to the penalty-phase proceeding. **However, as is clear from this court's case law**, as well as decisions of the United States Supreme Court, the question of relevance of a capital defendant's proffered evidence in a penalty-phase proceeding is not that simple. Its relevance is, instead, **a matter of statutory construction** in the **context** of federal constitutional requirements.

Id. 336 Or. at 451. (Emphasis added). This passage makes clear that the Oregon Supreme Court's ruling in this case was not necessarily controlled by federal constitutional jurisprudence, but merely informed by this Court's holdings. This matter simply is not in an appropriate procedural posture for review[14].

C.

IN COMPLIANCE WITH *HOWELL V. MISSISSIPPI*, RESPONDENT OFFERS ADDITIONAL ARGUMENTS AND AUTHORITIES.

Pursuant to *Howell v. Mississippi, supra*, Mr. Guzek submits that on a constitutional level, admission of the alibi evidence was required under the Eighth Amendment (Cruel and Unusual Punishment Clause; right to fair capital sentencing procedure); Due Process Clause of the Fourteenth Amendment (procedural and substantive due process), and the Sixth Amendment (Confrontation Clause) to the United States Constitution. This is so, even though his primary claims below involved issues resolvable on a sub-constitutional level; and even though his arguments below were predicated almost exclusively on his right to impeach the testimony of absent witnesses rather than upon a right to offer alibi as substantive evidence. In other words, -- as noted in his brief – he sought to introduce certain evidence tending to negate his guilt under a theory of impeachment. This is not to say, however, that

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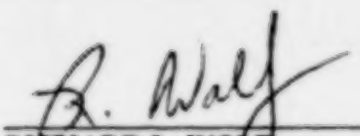
[14] If however, this Court, rather than remanding the case to the Oregon Supreme Court for clarification, or simply denying the petition, instead grants certiorari, judicial economy and issues of overriding national importance and integrity of the judicial system countenance granting review of the issues raised in Mr. Guzek's petition.

he did not raise and preserve the issue of his right under the foregoing United States Constitutional provisions to introduce alibi evidence as a "circumstance of the offense" pursuant to this Court's decisions *Eddings v. Oklahoma*, 455 U.S. 104 (1982), *Lockett v. Ohio*, 438 U.S. 586 (1978), *and Penry v. Lynaugh*, 492 U.S. 302 (1989). Mr. Guzek specifically adopts and incorporates each recited basis for admissibility of the alibi evidence presented in his opening brief (Supp. App.) together with the reasoning of the Oregon Supreme Court below and authorities cited therein.

CONCLUSION

This Court should deny Petitioner's petition for a writ of certiorari, or in the alternative, remand the case to the Oregon Supreme Court to permit clarification of whether the ruling in question was based on independent and adequate state law, or upon a federal constitutional provision.

Respectfully submitted,



RICHARD L. WOLF
Counsel of Record for Respondent Guzek
JOHN KEVIN HUNT
Attorney at Law
Attorneys for Respondent Guzek

Case Number: 04-928

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 2004 TERM

STATE OF OREGON, PETITIONER,

VS

RANDY LEE GUZEK, RESPONDENT.

CERTIFICATE OF SERVICE

I, Richard L. Wolf, counsel of record for Petitioner, Randy Lee Guzek, under penalty of perjury, certify that pursuant to Rule 29.2, Rules of the Supreme Court, service of the attached Motion for Leave to Proceed *in Forma Pauperis*, Respondent's Brief in Opposition to the Petition for Writ of Certiorari and Appendix on counsel for Petitioner, State of Oregon, by depositing in the United States Post Office, Portland, Oregon on March 9, 2005, first class postage prepaid, a certified, exact and full copy thereof addressed to:

Office of the Clerk
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

Hardy Myers, Attorney General of the State of Oregon
Mary Williams, Solicitor General of the State of Oregon
400 Justice Building
Salem, Oregon 97310
(503) 378-4402
Attorney's for Respondent, State of Oregon.

R. Wolf

Richard Lewis Wolf
Richard L. Wolf, P.C.
12940 NW Marina Way
Portland, Oregon 97231
(503) 384-0910

(3)

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No. 04-928

In the Supreme Court of the United States

STATE OF OREGON,

Petitioner,

v.

RANDY LEE GUZEK,

Respondent.

Petition for Writ of Certiorari to the Oregon Supreme Court

REPLY BRIEF

HARDY MYERS
Attorney General of Oregon
PETER SHEPHERD
Deputy Attorney General
***MARY H. WILLIAMS**
Solicitor General
400 Justice Building
Salem, Oregon 97301-4096
Phone: (503) 378-4402
Counsel for Petitioner

***Counsel of Record**

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REPLY BRIEF

Petitioner, the State of Oregon, has asked this Court to review the Oregon Supreme Court's decision, which holds that the Eighth Amendment requires admission of residual-doubt evidence in a capital penalty-phase proceeding. In response, Guzek contends that the state court's decision rests on state rather than federal law. Alternatively, Guzek asserts that the source of the state court's decision is ambiguous and the case should be remanded to permit the court to clarify the basis for its decision. To the contrary, as the State explained in the petition for writ of certiorari, the Oregon Supreme Court was unanimous in its recognition that it was deciding a federal constitutional question. It divided only on how the members of the court resolved that federal question.

Guzek makes two related assertions in response to the State's petition. First, he asserts that "although the ruling below was informed by federal law, it was premised on clauses of two state statutes." Brief in Opposition at 1-3. He points to a statutory basis for admitting one of the excluded pieces of evidence—testimony from his grandfather that would have established an alibi to place him somewhere other than the crime scene at the time of the murder. Brief in Opposition at 2. Guzek correctly notes, as did the Oregon Supreme Court, that a state statute authorizes the admissibility of a transcript of any witness's testimony from a prior proceeding in a new sentencing proceeding, including this evidence that the trial court excluded. Or. Rev. Stat. § 138.012(2)(b). Obviously, that state statutory ruling did not prompt the State to seek this Court's review, although the State agrees with the dissent

that the error was not prejudicial because the evidence was not relevant to any issue in the sentencing proceeding, and that determination turns on the federal constitutional issue raised in the State's petition for certiorari.

Of greater concern to the State is the breadth of the state court's holding that, in any subsequent penalty-phase proceeding, "*any* alibi evidence that defendant proffers in mitigation shall be admissible." *State v. Guzek*, 336 Or. 424, 464, 86 P.3d 1106 (2004) (emphasis added) (Appendix to Petition at App-64). This holding applies not only to whatever alibi evidence Guzek may offer in the subsequent penalty-phase proceeding in this case, but to any alibi evidence other capital defendants may offer in penalty-phase proceedings. For that reason, the State did not differentiate in its petition for writ of certiorari between the grandfather's alibi testimony, the alibi testimony of Guzek's mother that the state appellate court ruled admissible on federal constitutional grounds, and any other testimony Guzek and other defendants may offer under the court's ruling.

Guzek next urges this Court to deny the petition for writ of certiorari because he wants this Court to believe that "the source of the state appellate court's ruling is unclear or ambiguous" and, therefore, "the matter should be remanded for clarification." Brief in Opposition at 3-10. Under this section, Guzek offers an interesting—and generally contradictory—discussion of how the residual-doubt issue was presented to the Oregon Supreme Court. On the one hand, he asserts that he did not clearly present an Eighth Amendment residual-doubt claim to the state appellate court. On the other hand, he repeatedly states

that he did raise and preserve the Eighth Amendment claims. His point seems to be captured in the following statement: "While he certainly made reference to the Eighth Amendment and relevant case law of this Court, sufficient to preserve such arguments on higher review, it is clear from Mr. Guzek's briefing in this matter that neither party expected the Oregon Supreme Court to make this into a federal case." Opposition Brief at 7.

Guzek either raised the issue or he didn't. He cannot have it both ways. The State agrees that Guzek's brief in the Oregon Supreme Court was not a model of clarity and that the Oregon Supreme Court had to look closely to find the Eighth Amendment issue in the brief. Nonetheless, the State appellate court did find the issue and it squarely addressed it in an opinion that now controls the result in all Oregon trial courts faced with this issue. The parties may have been surprised that the Oregon Supreme Court addressed the issue, but the court did not overstep its bounds in addressing an issue that Guzek—as he appears to acknowledge—presented to it.

Thus, no remand is needed to permit the state appellate court to "clarify" the basis for its decision. The court could not be more explicit that it split over the precise federal question the State has presented in the petition for writ of certiorari. The majority described the issue before it as follows:

> Specifically, the legislature intended to ensure the admissibility of such evidence that the Eighth Amendment *requires* that a penalty-phase jury consider. The remaining question, then, involves a determination

> whether the alibi evidence that defendant proffered at his third penalty-phase proceeding—specifically, his mother's testimony—fell within that federal constitutional category. As explained below, the Supreme Court's Eighth Amendment jurisprudence suggests that defendant's alibi evidence is the type of evidence that a defendant is constitutionally entitled to introduce during the penalty phase for the jury's consideration.

Guzek, 336 Or. at 456-57, App-52 (emphasis in original). The majority then went on to discuss in detail this Court's case law and it concluded that the alibi evidence Guzek sought to introduce "was required to be considered by the jury under the Eighth Amendment." *Id.*, 336 Or at 462, App-61.

The dissent's opinion likewise rests without question on its analysis of this federal constitutional question:

> [The] history [of the state statute] establishes, as the majority acknowledges, that what the legislature intended to allow as "mitigating" evidence was precisely what the United States Supreme Court would require pursuant to the federal constitution; nothing more, nothing less. Thus, the true question in the case boils down to this: Would the United States Supreme Court, if faced with the question, hold that a defendant in the position of defendant here would be entitled, in a penalty phase proceeding, to assert that he should receive a sentence less than death because, in fact, he is innocent of the underlying crime?

Guzek, 336 Or. at 468-69, App-70 (Gillette, J., and Carson, C.J., concurring in part and dissenting in part). The dissent's analysis makes it simply unquestionable that, like the majority, its opinion rests strictly on its interpretation of the Eighth Amendment. A remand to the Oregon Supreme Court could in no way aide in this Court's review of the federal constitutional issue presented in the State's petition.[1]

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[1] The State is at a loss to understand the significance of Guzek's assertion that the Oregon Supreme Court "was sitting with only a quorum of five members, rather than a full seven-member court." Brief in Opposition at 8. The holding of the court has no lesser precedential value because two members were recused. And, even if this Court were to grant Guzek's request for remand of the case to the Oregon Supreme Court, the same five members would consider the case on remand.

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Petition for Writ of Certiorari to the Oregon Supreme Court

BRIEF FOR PETITIONER STATE OF OREGON

HARDY MYERS
Attorney General of Oregon
PETER SHEPHERD
Deputy Attorney General
***MARY H. WILLIAMS**
Solicitor General
400 Justice Building
Salem, Oregon 97301-4096
Phone: (503) 378-4402
Counsel for Petitioner

*Counsel of Record

QUESTION PRESENTED

In *Franklin v. Lynaugh*, this Court concluded that a capital defendant does not have a constitutional right to an instruction telling the jury in the penalty phase to consider "residual doubt" about defendant's guilt. Most state and federal appellate courts have relied on *Franklin* to conclude that a capital defendant has no constitutional right to offer evidence and argue in a penalty-phase proceeding that he should receive a sentence less than death because he continues to assert his innocence of the underlying crime. The Oregon Supreme Court, however, held in this case that a capital defendant has a federal constitutional right to present in a penalty-phase proceeding alibi evidence that casts doubt on his guilt. The question presented is:

Does a capital defendant have a right under the Eighth and Fourteenth Amendments to the United States Constitution to offer evidence and argument in support of a residual-doubt claim—that is, that the jury in a penalty-phase proceeding should consider doubt about the defendant's guilt in deciding whether to impose the death penalty?

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Crocker,
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OPINION BELOW

The opinion of the Oregon Supreme Court (Pet. App. 1-86) is reported at *State v. Guzek*, 336 Or. 424, 86 P.3d 1106 (2004), *cert. granted*, 543 U.S. ___, 125 S. Ct. 1929 (2005). The order of the court denying defendant's petition for reconsideration (Pet. App. 87) is not reported.

JURISDICTION

The opinion of the Oregon Supreme Court was issued on March 4, 2004, and the court's order denying defendant's petition for reconsideration was dated and filed on September 8, 2004. The petition for writ of certiorari was filed on January 5, 2005, within the time granted by the extension of time allowed by Justice O'Connor on November 26, 2004. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment, provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

This capital case came before the Oregon Supreme Court three times on automatic and direct review of judgments that imposed a sentence of death for aggravated murder. Following the initial trial and sentencing proceeding, the Oregon Supreme Court affirmed defendant's

conviction of two counts of aggravated murder, *State v. Guzek*, 310 Or. 299, 304, 797 P.2d 1031, 1034 (1990) (*Guzek I*). The following description of the murder is taken from the Oregon Supreme Court's opinion:

> The facts surrounding this vicious crime can be stated briefly. Defendant, who was 18 years old at the time of the offense, had dated a high school acquaintance during the 1986-87 school year. The high school acquaintance at the time lived with her uncle and aunt, Rod and Lois Houser, at Terrebonne, a rural community in Deschutes County. Rod Houser disapproved of defendant; Houser's niece broke off the relationship. The parting was not amicable; defendant resented both the niece and her uncle.
>
> On Sunday, June 28, 1987, defendant met with two friends, Mark Wilson and Ross Cathey. The three men planned to burglarize a rural Deschutes County home where they believed a large amount of jewelry was kept. Defendant, who was the leader and planner in the group, instructed Cathey to cut the throat of their prospective victim with a knife that defendant supplied. Cathey agreed. That plan failed, however, when there turned out to be too many lights and too many cars at the targeted residence when the conspirators arrived.
>
> Thwarted, the three men started to drive back toward Redmond, the nearest town. They were continuing to look for a house to burglarize. Cathey suggested the Houser residence, which he and Wilson had remarked upon earlier that day as a possible tar-

get for a burglary. All three agreed on this alternate target.

The three returned to the home in Redmond that defendant shared with his father. There, defendant secured two guns (a .22 rifle and a .32 pistol) to be used in robbing the Housers. The three then departed for the Housers'. On the way, they stopped at a secluded spot and defendant test fired the rifle, showing Wilson how to clear the action of the weapon if it jammed. The journey resumed.

Somewhere during the drive it seems to have been settled that, if the Housers proved to be home when the three arrived, the couple would be killed. The Housers were at home.[1] Defendant rang the doorbell and pounded on the door until Rod Houser finally answered it. A short, hostile discussion between defendant and Rod Houser ensued. Defendant then yelled "Do it!" to Wilson, who began firing the .22 at Rod Houser. Rod Houser retreated into the house, where he was felled by a fatal fusillade from the .22. Defendant ran upstairs and shot Lois Houser three times with the .32 pistol, killing her.

The men then ransacked the Houser residence, taking a great deal of personal property, including a ring that defendant pulled from Lois Houser's finger after he had murdered her. The men took the property to Redmond and stored it in various locations through the help of defendant's father.

The Housers' bodies were discovered two days after the murders. Suspicion came to center on defendant and Wilson, due to the enmity between defen-

dant and the Housers. Eventually, police arrested defendant, Wilson, and Cathey. Wilson and Cathey confessed, implicating defendant. Both men testified against defendant at his trial. The state permitted each to plead guilty to a reduced charge in return for his testimony. A jury convicted defendant of both murders.

---

[1] The niece was not there.

Guzek I, 310 Or. at 301-302, 797 P.2d at 1032.

Oregon's death penalty statute at the time of the first trial did not require the trial court to instruct the penalty-phase jury to consider all mitigating circumstances when deciding whether the defendant should receive a death sentence, and the trial court did not give a mitigation instruction. On direct review, the Oregon Supreme Court affirmed the convictions, but reversed defendant's sentence of death in light of *Penry v. Lynaugh*, 492 U.S. 302 (1989), holding that the Eighth Amendment requires a penalty-phase jury to be able to consider and give effect to all relevant mitigating evidence. *Guzek I*, 310 Or. at 305-306, 797 P.2d at 1034.

In the second sentencing proceeding, a new jury again imposed the death penalty. On direct review, the Oregon Supreme Court reversed on the ground that the trial court erroneously had admitted victim-impact evidence against defendant, based on *Payne v. Tennessee*, 501 U.S. 808, *reh'g den.*, 501 U.S. 1277 (1991). The Oregon Supreme Court agreed with defendant that the victim-impact evidence was not relevant to any of the questions that the

jury was required to consider under Oregon's statutory scheme. The court remanded the case for a third penalty-phase proceeding. *State v. Guzek*, 322 Or. 245, 270-71, 906 P.2d 272, 287 (1995) (*Guzek II*).

A new jury again imposed the death penalty and the case came before the Oregon Supreme Court for a third time. The State conceded that error in this third penalty-phase proceeding once again required a reversal and remand for another penalty-phase proceeding.[1] The Oregon Supreme Court agreed with the State's concession, vacated defendant's death sentence, and remanded for a fourth penalty-phase proceeding.[2] *State v. Guzek*, 336 Or.

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[1] The problem in the third penalty-phase proceeding related to the trial court's refusal to instruct the jury about the true-life sentencing option, an option not available at the time of the crime, but available at the time of the sentencing proceeding. At the time of the third penalty-phase proceeding, the Oregon Supreme Court had ruled that retroactive application of the true-life sentencing option violated the state and federal prohibitions against *ex post facto* laws. Guzek waived all *ex post facto* challenges, but the trial court concluded that the true-life option nonetheless was not available to him. Subsequent to the third penalty-phase proceeding, the Oregon Supreme Court ruled in a different case that refusing to instruct a jury about the true-life sentencing option in these circumstances was reversible error. *State v. McDonnell*, 329 Or. 375, 388-89, 987 P.2d 486, 494 (1999). In light of that holding, the State conceded that the trial court's failure to instruct the jury on the true-life sentencing option in this case required reversal and remand for a fourth penalty-phase proceeding.

[2] As the State explained in its petition for writ of certiorari, the need for further proceedings does not deprive this

424, 86 P.3d 1106 (2004) (*Guzek III*), Pet. App. 11-13. The court then addressed some of the remaining issues defendant had raised on appeal, which are likely to arise on remand. Pet. App. 13. Among those issues was the trial court's refusal to permit defendant to introduce as mitigation evidence certain alibi evidence that would, if believed, show he was not present when the murders occurred.

Defendant described that evidence when he filed a Notice of Intent to Rely on Evidence of Alibi as Mitigating Evidence.[3] J.A. 94. Defendant alerted the State that he would offer the following alibi evidence:

Court of jurisdiction over this federal issue. It falls within the third category of cases described in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481 (1975), because "later review of the federal issue cannot be had, whatever the ultimate outcome of the case" on remand. *See also Florida v. Thomas*, 532 U.S. 774 (2001) (application of the four *Cox* categories).

No matter the outcome of the fourth penalty-phase proceeding in this case, the State will be precluded from appealing any trial court ruling that complies with the Oregon Supreme Court decision by admitting alibi evidence offered as mitigation evidence. If defendant is again sentenced to death, the issue will be moot. If he is sentenced to something less than death, the issue will be unappealable because of double-jeopardy principles. Either way, the state cannot get review of this federal issue unless this Court addresses it now.

[3] Oregon law requires the defendant to file a written notice of intent to rely on alibi evidence at trial. Or. Rev. Stat. § 135.455. App. 1.

> 1. The prior court testimony of Clarence Guzek, [defendant's grandfather,] since deceased, will be offered to prove that on June 28, 1987 from approximately 9:00 pm until June 29, 1987 at approximately 2:00 am Randy Guzek was in the presence of and at the home of Clarence Guzek on Walnut Street in Redmond, Oregon.
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> 2. The testimony of Kathleen Guzek[, defendant's mother,] will be offered to prove that on June 29, 1987 she noted that at 2:16 am defendant asked her to set the alarm clock as he had to get up early for work the next day. The location of this conversation was at her residence on Walnut Street in Redmond, Oregon. She will further testify that when the alarm woke her at 4:20 am on June 29, 1987 she woke the defendant who was sleeping on a love seat on the deck of her house.

Id. If believed, this evidence would place defendant somewhere other than the victims' home at the time of the murder. The evidence would be contrary to defendant's convictions for murdering the Housers.

The trial court excluded the alibi evidence, apparently on relevance grounds.[4] Defendant argued on direct and

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[4] The limited discussion in the trial court is set out in the Joint Appendix. J.A. 80-93. The Oregon Supreme Court noted the inadequacy of the record for determining the trial court's specific ruling. Pet. App. 43 n. 19. Nevertheless, the court found that any record problems were immaterial "because we focus on the issue as it may arise on remand." *Ibid.* The case necessarily will be remanded for a fourth sentencing proceeding and, under the majority's holding, the trial court

automatic review of the judgment that the trial court erred in excluding the evidence because it was mitigating evidence relevant to the statutory question "[w]hether the defendant should receive a death sentence."[5] Pet. App. 43.

The Oregon Supreme Court first considered the state legislature's intent in authorizing the admission of mitigating evidence that is relevant to whether the defendant should receive a death sentence. Pet. App. 46-52. The court concluded that "the legislature intended to limit the admission of 'mitigating evidence' in penalty-phase proceedings so as to satisfy the Eighth Amendment." Pet. App. 52. "Specifically, the legislature intended to ensure the admissibility of such evidence that the Eighth Amendment *requires* that a penalty-phase jury consider." *Ibid.* (emphasis in original). *See also* Pet. App. 70 ("what the legislature intended to allow as 'mitigating' evidence was precisely what the United States Supreme Court would require pursuant to the federal constitution; nothing more, nothing less.") (Gillette, J., Carson, C.J., con-

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there must admit "*any* alibi evidence that defendant proffers in mitigation." Pet. App. 64 (emphasis added). Thus the Eighth Amendment issue is squarely presented in this case in spite of any record deficiencies and the focus should be on the future use of alibi evidence, not the particular arguments made in the prior proceedings.

[5] Or. Rev. Stat. § 163.150(1)(b)(D) requires the jury to consider, as one of four questions necessary for the imposition of the death penalty, "[w]hether the defendant should receive a death sentence."

curring in part and dissenting in part).[6] Thus, the court unanimously concluded that the question—whether the alibi evidence offered in this case as mitigation evidence was properly excluded—turns solely on whether the Eighth Amendment, applicable to the States through the Fourteenth Amendment, requires its admission as mitigation evidence.

The court's members parted ways in resolving that federal constitutional question. A three-justice majority concluded that "the Supreme Court's Eighth Amendment jurisprudence suggests that defendant's alibi evidence is the type of evidence that a defendant is constitutionally entitled to introduce during the penalty phase for the jury's consideration." Pet. App. 52. The two dissenting justices viewed the alibi evidence as "not related to any mitigating fact that informs the jury's consideration of the severity of the crime." Pet. App. 85.

As explained in more detail in the argument portion of this brief, the disagreement in the Oregon Supreme Court centered on how the justices read this Court's Eighth Amendment case law. Both the majority and dissent began with this Court's holding that the Eighth Amendment requires the sentencer to consider as mitigation "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant

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[6] The two justices agreed with the State's concession and therefore concurred in the reversal and remand of this case for a new sentencing proceeding. On the issue before this Court, the two justices dissented, so the State will refer to them as "the dissent" in this brief.

proffers as a basis for a sentence less than death." *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)).[7] Where they differed is in how broadly they read "the circumstances of the offense" under this Court's Eighth Amendment case law.

SUMMARY OF ARGUMENT

The Eighth Amendment requires the sentencer in a capital case to consider mitigation evidence about the defendant's character or record or about the circumstances of the offense. The Oregon Supreme Court misread this Court's case law to require "circumstances of the offense" evidence to include evidence that would challenge the legal foundations of a defendant's convictions. But the Eighth Amendment is more focused. This Court's Eighth Amendment jurisprudence entitles a capital defendant to present evidence addressing his moral culpa-

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[7] The Oregon legislature also has adopted this Court's definition of mitigation. By statute, the trial court must instruct the jury about specific mitigation factors and, more generally, about mitigation as defined by this Court. Or. Rev. Stat. § 163.150(1)(c); App. 3. The legislature amended this provision in 1995 and 1997 to require consideration of "any aggravating evidence" and victim-impact evidence. The Oregon Supreme Court ruled that, in the fourth sentencing proceeding, "the trial court is precluded [by the state *ex post facto* clause] from retroactively applying the 'any aggravating evidence' provision[,]" but may apply the victim-impact evidence provision, due to a "victim's rights" state constitutional provision that supersedes the *ex post facto* provision. Pet. App. 63-64.

bility only, because that evidence is relevant to the sentencing jury's obligation to conduct an individualized assessment of whether the death penalty is the appropriate sentence. It does not provide a capital defendant with an additional opportunity in the penalty phase to reargue his legal culpability or guilt.

There is no alternative state-law basis for admitting this alibi evidence in the penalty phase as mitigation evidence. As a matter of Oregon law, once a jury finds a defendant guilty of aggravated murder beyond a reasonable doubt, the issue of guilt is not subject to relitigation as part of the sentencing process. Here, the Oregon Supreme Court affirmed defendant's convictions for aggravated murder, reversing and remanding only the penalty phase, and this Court declined to review that judgment. Under well-established principles of state law, defendant would not be permitted to offer evidence in the new sentencing proceeding that is relevant only to call into question his guilt. A defendant has other opportunities within the criminal-justice system to renew challenges to his or her guilt, but that opportunity does not exist in the sentencing proceeding under state law. The Oregon Supreme Court unanimously determined that the issue presented in this case turns on whether, notwithstanding these general finality principles of state law, the Eighth Amendment mitigation requirement entitles a capital defendant, in a resentencing proceeding, to offer evidence that challenges his guilt.

The Oregon Supreme Court's reading of "circumstances of the offense" to include alibi evidence is far broader than this Court has ever suggested is required by

the Eighth Amendment and is inconsistent with the purpose of requiring jury consideration of mitigation evidence in the penalty-phase proceeding. The Eighth Amendment requires a sentencer to consider mitigation evidence in making an individualized determination about whether a defendant—who already has been found guilty of an offense for which the death penalty is a possible punishment—should receive the penalty of death. The purpose of constitutionally required mitigation evidence is not to excuse the defendant's *legal* culpability for the offense. Instead, it gives the sentencing jury the opportunity to assess the defendant's *moral* culpability for the offense already found to have been committed, in order to decide whether the death penalty is the appropriate punishment for the defendant's crimes. To be constitutionally relevant, mitigation evidence about the "circumstances of the offense" must aid the jury in carrying out that individualized assessment about the appropriate punishment. But evidence that, if believed, would negate the defendant's guilt entirely does not assist the jury in performing that function.

Even if the alibi evidence is offered not in an attempt to reverse defendant's conviction, but instead as a basis for arguing that any lingering or residual doubt about defendant's guilt should mitigate against imposition of the death penalty, it is constitutionally irrelevant. In *Franklin v. Lynaugh*, 487 U.S. 164, *reh'g den.*, 487 U.S. 1263 (1988), this Court rejected arguments that residual doubt has any constitutional relevance in a sentencing proceeding. Although the Court found it unnecessary to decide whether residual-doubt evidence and argument must be admitted to satisfy the Eighth Amendment mitigation re-

quirement, the Court's reasoning in rejecting a jury-instruction claim demonstrates that the Oregon Supreme Court misread the scope of the Eighth Amendment requirement.

The Oregon Supreme Court holding in this case has the potential to expand greatly the scope and complexity of capital sentencing proceedings. If the sentencing jury believes evidence offered to overcome the defendant's legal culpability for the crime, the sentencing jury has no appropriate way to give effect to its determination. The sentencing proceeding is limited to a determination of the appropriate penalty for the defendant's crime, and it does not permit a redetermination of the defendant's guilt. Moreover, requiring the sentencing jury to consider the alibi evidence in mitigation may effectively raise the state's burden of proof in capital cases from "beyond a reasonable doubt" to "beyond all doubt." This dramatic extension of this Court's Eighth Amendment case law should be rejected.

ARGUMENT

This case presents a narrow question: whether evidence that specifically challenges a capital defendant's guilt must be presented to and considered by a sentencing jury because it constitutes "circumstances of the offense." The Oregon Supreme Court has construed this Court's case law to require the trial court to admit and the sentencing jury to consider, as mitigation evidence, alibi testimony that would place defendant somewhere other than the scene of the murders, even though the state court previously has upheld defendant's convictions for the murders. In finding an Eighth Amendment require-

ment that the defendant be permitted to introduce this alibi evidence to the sentencing jury, the Oregon Supreme Court misread this Court's case law. The state court failed to consider the reason this Court has held that the Eighth Amendment requires the sentencing jury to consider the "circumstances of the offense" as mitigation evidence. Because the alibi evidence does not serve the purpose of the Eighth Amendment mitigation requirement, the Oregon Supreme Court erred in holding that the Eighth Amendment requires the admission of the alibi evidence in the remanded sentencing proceeding.

I. Under Oregon law, the trial court correctly rejected defendant's alibi evidence and argument because it was irrelevant to the sentencing determination.

There is no alternative state-law basis for admitting this alibi evidence in the penalty phase as mitigation evidence. In Oregon, as in most jurisdictions, once a defendant's guilt has been established, evidence challenging that guilt is not relevant to the sentencing determination. In capital cases, the trial proceedings are divided into a guilt phase and a distinct penalty phase. The purpose of the penalty phase is for the jury to answer four questions:

> (1) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that death of the deceased or another would result;
>
> (2) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;

(3) If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased; and

(4) Whether the defendant should receive a death sentence.

Or. Rev. Stat. § 163.150(1)(b)(A)-(D). The jury's responses to these four questions determine whether the defendant will be sentenced to death, life imprisonment without the possibility of parole, or life imprisonment. Or. Rev. Stat. § 163.150(2), App. 4.

In Oregon, the penalty-phase jury is not asked to reconsider whether the state has met its burden of establishing the defendant's guilt beyond a reasonable doubt. Instead, the narrow focus in the penalty phase is on whether the defendant should receive the death penalty. The focus on the appropriate penalty is the same whether the jury that determined the defendant's guilt is considering the penalty or whether, as in this case, an appellate court has affirmed the defendant's conviction but reversed a death sentence and remanded for a new penalty-phase hearing only. *See State v. Wagner*, 309 Or. 5, 786 P.2d 93, *cert. den.* 498 U.S. 879 (1990) (Oregon Supreme Court affirmed the defendant's convictions for aggravated murder, but remanded the case for the express purpose of conducting further proceedings on the penalty to be imposed); *State v. Moen*, 309 Or. 45, 786 P.2d 111 (1990) (same). And because the penalty phase is focused narrowly on the appropriate sentence, evidence that calls into doubt the defendant's guilt is not relevant to the questions the sentencing jury must answer.

This state-law principle—that certain decisions are treated as final and not subject to further challenge—also applies to specific findings or rulings within a trial. *See State v. Pratt*, 316 Or. 561, 569, 853 P.2d 827, 832, *cert. den.* 510 U.S. 969 (1993) (prior ruling on motion to suppress evidence is law of the case and not open for reconsideration on remand); *see also State v. Green*, 271 Or. 153, 531 P.2d 245 (1975) (case remanded to the trial court for the express purpose of determining whether the defendant killed the victim under extreme mental or emotional disturbance; whether the defendant killed the victim in the first place could not be relitigated); *State v. Boots*, 315 Or. 572, 848 P.2d 76, *cert. den.* 510 U.S. 1013 (1993) (on remand, trial court did not err in limiting the new trial to only a single element that would elevate murder to aggravated murder); *State v. Smith*, 190 Or. App. 576, 578-81, 80 P.3d 145, 145-147 (2003) (en banc), *rev. allowed*, 337 Or. 160 (2004) (Oregon Constitution requires appellate court to affirm a judgment, notwithstanding any error committed during the trial, if the court determines the judgment "appealed from was such as should have been rendered in the case"; this provision requires the appellate court to remand for limited purpose of determining whether an error was prejudicial).

Thus, Oregon law does not entitle defendant, in his fourth sentencing proceeding, to introduce evidence and argue that he is not guilty of the crimes for which he has been convicted. Whether this principle is described as "law of the case," *res judicata*, collateral estoppel, claim preclusion, or simply a matter of relevance, it is firmly established that once a ruling or decision has been made and finally affirmed in a criminal case, it is binding in

further proceedings. In this case, the Oregon Supreme Court has reviewed and affirmed defendant's conviction for aggravated murder and this Court denied review of that determination. Defendant's conviction is final and not subject to reconsideration in a new sentencing proceeding. Nor is evidence that pertains only to defendant's guilt relevant to the sole issue the sentencing jury must decide—whether the appropriate punishment for defendant's crimes is death.

Other state courts have reached the same conclusion—once guilt is established, the defendant cannot urge the sentencing jury to consider the validity of the jury's verdict establishing the defendant's guilt. *See Way v. State*, 760 So. 2d 903, 917 (Fla. 2000), *cert. den.* 531 U.S. 1155 (2001) (defendant may explain the circumstances of the crime, but may not relitigate the question of guilt); *People v. Emerson*, 189 Ill.2d 436, 503, 727 N.E.2d 302, 339, *cert. den.* 531 U.S. 930 (2000) (residual doubt is not relevant to the circumstances of the offense or to the defendant's character and, as a result, is not relevant to the imposition of the death penalty); *Holland v. State*, 705 So. 2d 307, 325 (Miss. 1997), *cert. den.* 525 U.S. 829 (1998) (on appeal from a resentencing trial for capital murder, the issue of guilt is *res judicata* and defendant is collaterally estopped from introducing evidence that challenges the guilty verdict of the original jury); *Evans v. State*, 112 Nev. 1172, 1202-1203, 926 P.2d 265, 284-85 (1996), *cert. den.* 520 U.S. 1245 (1997) (sentencing jury is precluded from considering lingering doubt because to do so it would have to reconsider the defendant's guilt or innocence; jury instruction that informs jury it is precluded from considering lingering

doubt is proper); *State v. Walls*, 342 N.C. 1, 52-53, 463 S.E.2d 738, 765-66 (1995), *cert. den.* 517 U.S. 1197 (1996) (once the jury determines at trial that the defendant is guilty, the sole remaining consideration at sentencing is the appropriate punishment; lingering or residual doubt as to the defendant's guilt is not a relevant circumstance to be submitted in a capital sentencing proceeding); *State v. Biegenwald*, 106 N.J. 13, 70, 524 A.2d 130, 160 (1987) (retrial at sentencing of issues relevant only to guilt is not permitted); *State v. McGuire*, 80 Ohio St. 3d 390, 403, 686 N.E.2d 1112, 1123 (Ohio 1997) ("Residual or lingering doubt as to the defendant's guilt or innocence is not a factor relevant to the imposition of the death sentence because it has nothing to do with the nature and circumstances of the offense or the history, character, and background of the offender[.]"); *Stockton v. Commonwealth*, 241 Va. 192, 210-11, 402 S.E.2d 196, 206-07, *cert. den.* 502 U.S. 902 (1991) (defendant cannot argue at sentencing that later evidence might establish his innocence; the issue of guilt was resolved in the first phase of the trial and could not properly be raised again in the penalty phase).

This is not to suggest that evidence offered to establish a capital defendant's innocence has no significance in any context once the jury has found him or her guilty beyond a reasonable doubt. The point is simply that evidence negating guilt has no relevance in the sentencing proceeding, where the sole question is what penalty is appropriate for the crime of which the defendant already has been found guilty beyond a reasonable doubt. The criminal justice system offers numerous other opportunities for a capital defendant to present evidence challeng-

ing guilt. State law may provide for a new guilt-phase trial if new evidence truly is both newly discovered and potentially exculpatory. *See, e.g.*, Or. Rev. Stat. § 136.535 (App. 1); Or. Rule Civ. Proc. 64 B(4) (App. 6-7). On direct appeal or in state collateral-review proceedings, a defendant may be able to show that alibi or other evidence relevant to guilt was not considered by the guilt-phase jury because of errors of the trial court or of counsel. In the proper circumstances, a defendant may then be entitled to a new trial at which the guilt-phase jury could consider the evidence. Similarly, evidence of actual innocence presented in federal habeas corpus may, under certain circumstances, compel a new guilt-phase trial. *Schlup v. Delo,* 513 U.S. 298 (1995); *Sawyer v. Whitley*, 505 U.S. 333, *reh'g den.* 505 U.S. 1244 (1992). Finally, exculpatory evidence may be presented to the Governor as part of a defendant's request for executive clemency or pardon. *See generally* Or. Const. Art. V, § 14; Or. Rev. Stat. §§ 144.649-144.670.

Notwithstanding the potential relevance of alibi evidence in these other legal settings, that evidence unquestionably is not relevant under Oregon law as mitigation evidence in a capital sentencing proceeding. So the question in this case comes down to a federal constitutional question. On this point, the Oregon Supreme Court was unanimous—the defendant in this case is entitled to introduce alibi evidence as mitigation in the remanded sentencing proceeding only if the Eighth Amendment requires it.

II. The Eighth Amendment requires the sentencer to assess the defendant's character and background and the circumstances of the offense. Evidence that is constitutionally relevant to this assessment must relate to the defendant's moral culpability, not to the defendant's legal culpability.

This Court's Eighth Amendment case law establishes two separate prerequisites to a valid death sentence. First, the Eighth Amendment requires capital sentencing schemes to channel the jury's discretion in order to avoid a system in which the death penalty would be imposed in an arbitrary or unpredictable manner. *Furman v. Georgia*, 408 U.S. 238 (*per curiam*), *reh'g den.* 409 U.S. 902 (1972). The jury's discretion must be directed and limited so as to minimize the risk of wholly arbitrary and capricious action. *Proffitt v. Florida*, 428 U.S. 242, *reh'g den.* 429 U.S. 875 (1976); *Gregg v. Georgia*, 428 U.S. 153, *reh'g den.* 429 U.S. 875 (1976).

The second principle, in some tension with the first, is that the Eighth Amendment requires the jury to make an individualized sentencing determination, taking into consideration relevant mitigating evidence about the defendant. "Relevance" has no different meaning for mitigating evidence in a capital sentencing proceeding than it does for any other type of evidence, so the threshold for relevance is low. *McKoy v. North Carolina*, 494 U.S. 433 (1990). But there are limits, and the extent of those limits is what divided the Oregon Supreme Court in this case.

Both the majority and the dissent recognized this Court's consistent definition of constitutionally relevant mitigating evidence as encompassing three areas: (1)

evidence of the defendant's character; (2) evidence of the defendant's background; and (3) evidence of the circumstances of the offense. Obviously, alibi evidence does not relate to a defendant's character or background. So this case turns on whether alibi evidence relates to the circumstances of the offense. The *Guzek III* majority answered the question by fact-matching the alibi evidence in this case to evidence in other cases that this Court held must be considered by the jury as mitigation evidence. Although correctly noting many of the holdings from this Court's Eighth Amendment case law, the *Guzek III* majority failed to appreciate the underlying reason why capital sentencing juries must consider constitutionally relevant mitigating evidence, including evidence about the circumstances of the offense. The simplest way to understand why sentencing juries must consider this evidence and, therefore, what limits states may place on this evidence, is to trace how the principle of individualized sentencing developed.

In *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976), a plurality of the Court concluded that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Two years later, a plurality of the Court again held that the Eighth Amendment requires that the jury "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than

death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis in original).

That holding became the majority view in *Eddings*, and *Eddings* further held that the jury must give consideration to any relevant mitigating evidence offered by the defendant as the basis for a sentence less than death. 455 U.S. at 113-114. But, once again, the Court limited that constitutionally relevant mitigating evidence to evidence of the defendant's character and record and evidence of the circumstances of the offense.

As the Court explained, the Eighth Amendment requirement that the sentencing jury consider mitigation evidence of that nature traces back to the early days of the common law and the "twin objectives" that "the legal system has struggled to accommodate." *Id.* at 110. Those "twin objectives" are the two principles described at the outset of this argument: the need to have consistency and structure in a capital punishment system and the need to consider the uniqueness of the individual. *Id.* at 111. Moving too far in either direction runs afoul of the Eighth Amendment. Thus, a mandatory death sentence provides consistency and structure, but at the cost of ignoring individual differences. *Woodson*, *supra*, 428 U.S. at 304 (opinion of Stewart, Powell, and Stevens, JJ.) (a mandatory death sentence "that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind").

More specifically, the Eighth Amendment requires the sentencer to make an individualized determination about the defendant's moral culpability. *Penry*, 492 U.S. at 319. In *Penry*, this Court explained:

> Underlying *Lockett* and *Eddings* is the principle that punishment should be directly related to the personal culpability of the criminal defendant. If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). Moreover, *Eddings* makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence. *Hitchcock v. Dugger*, [481 U.S. 393, 398-399 (1987)]. Only then can we be sure that the sentencer has treated the defendant as a "uniquely individual human bein[g]" and has made a reliable determination that death is the appropriate sentence. *Woodson*, 428 U.S., at 304, 305. "Thus, the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime." *California v. Brown*, *supra*, at 545 (O'Connor, J., concurring) (emphasis in original).

Ibid.

Thus, evidence that a defendant, although guilty of the crime, may have played a lesser role than co-defendants in causing the victim's death is constitutionally relevant mitigating evidence about the circumstances of the offense. That evidence helps the sentencer make an individualized determination about the defendant's moral culpability[8] and, therefore, helps the sentencer determine the appropriate sentence that should be imposed as punishment for the offense. Evidence that does not aid the sentencer in resolving that specific question—the ap-

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[8] Some of the confusion in this area stems from the overlapping terminology used to describe the determination the jury makes in the guilt phase and the determination the jury makes in the penalty phase. Often, both are described in terms of culpability, with the guilt phase focused on legal culpability or blameworthiness and the penalty phase focused on moral culpability or deathworthiness. *See* Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 Fordham L. Rev. 21, 26-27 (1997) ("Deathworthiness is broad enough to include all of the factors relevant to the sentencing decision: the defendant's culpability for the crime, as well as his character, record, and background, and the circumstances and character of the murder. Deathworthiness appropriately refocuses the inquiry from whether the defendant is blameworthy—the question resolved at the guilt phase—to whether the defendant is worthy of being sentenced to death—the judgment made at the punishment phase."). In this brief, the State differentiates these two distinct concepts by using the phrases "legal culpability" for the guilt-phase determination and "moral culpability" for the penalty-phase determination.

propriate sentence to be imposed for the defendant's crime—is not constitutionally relevant mitigating evidence.[9]

Further insight into the proper scope of Eighth Amendment mitigation evidence can be gained by looking at the two distinct phases of the capital sentencing process, the eligibility phase and the selection phase. *Tuilaepa v. California*, 512 U.S. 967, 971 (1994). The purpose of the eligibility phase is to narrow the class of defendants eligible for the death penalty, typically through consideration of aggravating circumstances. *Id.* at 971-72. The jury then must determine, in the selection phase, whether to impose a death sentence on an eligible defendant. *Id.* at 972. The requirement that the jury be permitted to consider and give effect to relevant mitigating evidence applies only in the selection phase. *Buchanan v. Angelone*, 522 U.S. 269, 275-76 (1998). "[T]he state may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence." *Id.*, at 276 (*citing Johnson v. Texas*, 509 U.S. 350, 362, *reh'g den.* 509 U.S. 941 (1993); *Penry*, *supra*, at 326; *Franklin*, 487 U.S. at 181). But what is relevant in the selection phase turns on the purpose of that phase—deciding the appropriate penalty for a defendant already determined to be eligible for the death penalty.

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[9] Jury consideration of the defendant's role in the crime also promotes society's legitimate interest in retribution and deterrence. *See Skipper v. South Carolina*, 476 U.S. 1, 13 (1986) (Powell, J., concurring).

Thus, the Eighth Amendment requires the sentencing jury to consider any aspects of the defendant's character or background and aspects of the offense that help the jury make an individualized assessment of whether the particular defendant should receive the death penalty for the offense the defendant has been found to have committed. Unlike evidence a defendant may offer in the guilt phase, constitutionally relevant mitigation evidence does not provide an excuse from criminal responsibility. Instead, it focuses on the defendant as an individual and on whether the death penalty is the appropriate sentence given the defendant's individual characteristics. [10]

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[10] In some circumstances, evidence offered in the guilt phase and the penalty phase may have considerable overlap. For example, a defendant may present evidence of mental illness as part of an insanity defense in the guilt phase and may offer very similar evidence in the penalty phase as mitigation evidence. But the focus for the jury is different, even though the evidence may be similar. In the guilt phase, the focus is on whether the mental illness so impaired the defendant's judgment that he or she cannot be held criminally responsible for his or her actions. In the penalty phase, the focus is on whether the death penalty is an appropriate punishment for a defendant who may lack the ability to make certain choices even though that lack of ability does not excuse the defendant's guilt. *See also Eddings*, 455 U.S. at 115-16 (describing youth as "a time and condition of life when a person may be most susceptible to influence and psychological damage"; consideration of youth in the penalty phase recognizes that minors "generally are less mature and responsible than adults" and often lack the judgment expected of adults); *Graham v. Collins*, 506 U.S. 461, 518, *reh'g den.* 507 U.S. 968 (1993) (Souter, J., dissenting) ("Youth may be understood to mitigate

Viewed in this light, mitigation evidence about the circumstances of the offense does not include all aspects of the offense that were litigated in the guilt phase, but only aspects of the offense that assist the jury in making the assessment of moral culpability. Typically, that will be limited to aspects of the offense that are not specific elements needed to establish guilt. The *Guzek III* dissent's description of the type of evidence that would be constitutionally relevant seems complete: evidence that "describe[s] the reason that defendant committed the offense, his conduct during the offense, his relative participation in the offense, or any other fact or circumstance regarding the offense itself that would reduce his moral responsibility." Pet. App. 84. Because the alibi evidence at issue in this case describes none of those things, it is relevant only to defendant's legal culpability and not to defendant's moral culpability. And, as discussed in detail below, any doubt about the scope of the mitigation evidence related to circumstances of the offense is dispelled by the Court's reasoning in *Franklin*.

III. *Franklin*'s residual-doubt discussion makes it clear that evidence challenging guilt cannot constitute evidence of the "circumstances of the offense" for purposes of the Eighth Amendment.

In *Lockett*, *Bell*, and other cases, this Court has addressed evidence that must be considered as mitigation evidence under the Eighth Amendment. Much of this

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by reducing a defendant's moral culpability for the crime, for which emotional and cognitive immaturity and inexperience with life render him less responsible[.]").

Court's case law has focused on evidence of the defendant's character and background. *See, e.g., Hitchcock*, 481 U.S. at 397-399 (difficult circumstances of defendant's upbringing and his potential for rehabilitation as mitigating evidence); *Skipper*, 476 U.S. at 8 (defendant's good adaptation to prison life as mitigating evidence); *Eddings*, 455 U.S. at 115-116 (16-year-old defendant's troubled family history and emotional disturbance as mitigating evidence); *Lockett*, 438 U.S. at 608 (plurality opinion) (youth as a relevant mitigating circumstance). For this type of mitigating evidence, the Court has stated that "virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances." *Payne*, 501 U.S. at 822.

By contrast, the Court's description of mitigation evidence that pertains to "circumstances of the offense" demonstrates that this evidence can be limited to exclude evidence that would negate the defendant's guilt. In *Tuilaepa*, this Court approved a statutory requirement that the sentencer consider the "circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true." 512 U.S. at 975-76. In rejecting the defendants' vagueness challenge, the Court described this jury instruction as "implement[ing] what we have said the law requires." *Id.* at 976. "The circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence." *Ibid.* In *Blystone v. Pennsylvania*, 494 U.S. 299, 305 (1990), this Court similarly approved a state statute that authorized the

death penalty "only after a determination that the aggravating circumstances outweigh the mitigating circumstances present in the particular crime committed by the particular defendant[.]" *See also Sumner v. Shuman*, 483 U.S. 66, 79-80 (1987) (describing the need to consider that "the level of criminal responsibility of a person convicted of murder may vary according to the extent of that individual's participation in the crime" and providing examples of the "variety of circumstances that may surround a murder by a life-term inmate"). In each of these cases, the Court focused on the need for the sentencing jury to consider information about the circumstances of the particular crime. Nothing in the Court's discussions suggests that the need for jury consideration of the circumstances of the offense extends to circumstances that would eliminate the defendant's responsibility for the offense.

This Court's reasoning in *Franklin* offers the best analysis of the limits that apply in defining evidence of "circumstances of the offense." *Franklin* involved a challenge to jury instructions on mitigation evidence. The jury found the defendant guilty of capital murder. 487 U.S. at 168. In the penalty phase, the trial court rejected some of the defendant's requested jury instructions. *Id.* at 170. On appeal, the defendant argued that the jury instructions "did not provide sufficient opportunity for the jury, in the process of answering the two Special Issues, to consider whatever 'residual doubt' it may have had about [the defendant's] guilt." *Id.* at 172. Specifically, the defendant argued that the jury may have harbored residual doubts about his identity as the murderer, about the extent to which his actions actually caused the vic-

tim's death, and about the extent to which his actions were intended to cause the victim's death. *Ibid.* He sought a ruling from this Court that the jury should have been instructed that it could consider residual doubt on these issues in determining the appropriate penalty.

Writing for four members of the Court, Justice White rejected the defendant's assertion that *Lockhart v. McCree*, 476 U.S. 162, 180-82 (1986), supported his claim that he was constitutionally entitled to a residual-doubt instruction. Justice White noted that *Lockhart*'s discussion of residual doubt stood for the "simple truism" that, where states permit residual-doubt argument, the doubt works in favor of the defendant. *Franklin*, 487 U.S. at 173. Justice White noted further that "the *Lockhart* dissent recognized that there have been only a 'few times in which any legitimacy has been given' to the notion that a convicted capital defendant has a right to argue his innocence during the sentencing phase." *Ibid.* (quoting *Lockhart*, 476 U.S. at 205-06 (Marshall, J., dissenting)).[11] Justice White summarily dismissed the idea that the Eighth Amendment mitigation requirement would stretch so far as to include residual doubt over the defendant's guilt. Nothing in pertinent Eighth Amendment jurisprudence "mandates reconsideration by capital juries, in the sentencing phase, of their 'residual doubts' over defendant's guilt." *Franklin*, 487 U.S. at 174. "Such

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[11] In *Lockhart*, the dissent also noted that the Court had consistently refused to grant *certiorari* in state cases holding that residual doubts could not properly be considered during capital sentencing proceedings, leaving those holdings in place. 476 U.S. at 205-06.

lingering doubts are not over any aspect of petitioner's 'character,' 'record,' or a 'circumstance of the offense.' This Court's prior decisions, as we understand them, fail to recognize a constitutional right to have such doubts considered as a mitigating factor." *Ibid.*

The Court went on to identify an additional, and alternative basis for rejecting the defendant's claim that he was entitled to the instruction he had requested. The Court concluded, in any event, that the defendant had not been precluded from making a residual-doubt argument and that the rejection of the instruction "was without impact on the jury's consideration of the 'residual doubts' issue." *Ibid.* But the Court took one final opportunity to signal its skepticism about the validity of the defendant's residual-doubt argument:

> In sum, even if petitioner had some constitutional right to seek jury consideration of "residual doubts" about his guilt during his sentencing hearing—a questionable proposition—the rejection of petitioner's proffered jury instructions did not impair this "right."

Id. at 175.

Justice O'Connor, joined by Justice Blackmun, wrote separately to address squarely the issue presented in this case. Beginning with the principle "that punishment should be directly related to the personal culpability of the criminal defendant," *Id.* at 184, Justice O'Connor also rejected the defendant's residual-doubt argument:

> In my view, petitioner's "residual doubt" claim fails, not because the Texas scheme allowed for consideration of "residual doubt" by the sentencing body,

but rather because the Eighth Amendment does not require it. Our cases do not support the proposition that a defendant who has been found to be guilty of a capital crime beyond a reasonable doubt has a constitutional right to reconsideration by the sentencing body of lingering doubts about his guilt. . . .

Our decisions mandating jury consideration of mitigating circumstances provide no support for petitioner's claim because "residual doubt" about guilt is not a mitigating circumstance. We have defined mitigating circumstances as facts about the defendant's character or background, or the circumstances of the particular offense, that may call for a penalty less than death. . . . "Residual doubt" is not a fact about the defendant or the circumstances of the crime. It is instead a lingering uncertainty about facts, a state of mind that exists somewhere between "beyond a reasonable doubt" and "absolute certainty." Petitioner's "residual doubt" claim is that the States must permit capital sentencing bodies to demand proof of guilt to "an absolute certainty" before imposing the death sentence. Nothing in our cases mandates the imposition of this heightened burden of proof at capital sentencing.

Id. at 187-188.

On the residual-doubt question, Justice O'Connor disagreed with the plurality not with respect to its discussion of residual doubt about the killer's identity in *Franklin*, or about guilt in general, but only with respect to its resolution of the defendant's arguments about "potential [residual] jury doubts over his responsibility for

the victim's death, and [about] the extent to which he intended the victim's death." *Franklin*, 487 U.S. at 187 (O'Connor, J., concurring). The plurality had rejected those latter two arguments on the basis that, because the questions presented to the penalty-phase jury had required it to determine if the defendant had deliberately caused the victim's death, they did not "limit[] the jury's consideration of any [lingering] doubts in these respects." 487 U.S. at 175. Justice O'Connor concluded that, in light of the other instructions that the jury had received, "[t]his conclusion is open to question." 487 U.S. at 187. She rejected the defendant's arguments "not because the Texas scheme [already] allowed for consideration of 'residual doubt' by the sentencing body, but rather because the Eighth Amendment does not require it." 487 U.S. at 187. But both Justice O'Connor and the plurality agreed that, with respect to questions about a defendant's guilt generally, nothing in the Eighth Amendment requires a penalty-phase jury to consider residual doubt.[12]

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[12] The *Franklin* dissent concluded that additional instructions were required to "allow the jury to give adequate weight to the evidence of [the defendant's] conduct in prison," because the instructions that were given allowed the jury to consider that evidence only "insofar as it shed light on [the defendant's] probable future conduct." 487 U.S. at 190 (Stevens, J., dissenting, joined by Brennan, J. and Marshall, J.). "[The defendant] therefore was at least entitled to an instruction informing the jury that it could answer one of the issues 'no' if it found by that evidence that [the defendant's] character was such that he should not be subjected to the ultimate penalty." *Id.* at 192.

As will be discussed below, the *Guzek III* majority dismissed *Franklin* as merely a decision about jury instructions. As the State described in its *certiorari* petition, no other court has construed the holding in *Franklin* so narrowly, and this Court, too, has described the holding in broader terms. The year following *Franklin*, this Court described its holding as follows: "a majority agreed that 'residual doub[t]' as to Franklin's guilt was not a constitutionally mandated mitigating factor." *Penry*, 492 U.S. at 320 (*citing Franklin*, 487 U.S. at 173, and n. 6 (plurality opinion); and at 187-88 (O'Connor, J., concurring in judgment)). Given the strong language of *Franklin*'s plurality opinion, its application to this case cannot be passed over so lightly.

IV. The Oregon Supreme Court's holding goes well beyond the Eighth Amendment requirement that sentencing juries consider the circumstances of the offense as part of the individualized determination whether death is the appropriate sentence.

The Oregon Supreme Court concluded that this Court's case law mandates the admission and jury consideration of alibi evidence offered in mitigation.[13] Al-

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[13] The court's holding is limited to the admissibility of alibi evidence. However, that holding must be read in context of the state's statutory scheme governing the death penalty. If the alibi evidence is admitted as constitutionally relevant mitigation evidence, as it must be under the court's holding, the defendant is permitted to argue that the jury should consider the evidence in answering the fourth question about mitigation and the trial court must instruct the jury to consider that evidence. Or. Rev. Stat. § 163.150, App. 1-6. Thus, the

though the court began its analysis by considering this Court's Eighth Amendment jurisprudence, the state court ultimately based its holding almost entirely on its reading of the factual circumstances in a Due Process case, *Green v. Georgia*, 442 U.S. 95 (1979) (*per curiam*). Because it saw the facts in *Green* as comparable to Guzek's attempt to introduce alibi evidence in the sentencing proceeding here, it felt compelled to conclude that the Eighth Amendment requires jury consideration of defendant's alibi evidence. But, as the *Guzek III* dissent pointed out, the majority's reading of *Green* places considerably more weight on that case than it can bear. Moreover, the majority failed to acknowledge this Court's reasoning in *Franklin* and it gave little consideration to the reason that the Eighth Amendment requires certain evidence to be considered by the sentencer. As a result, the majority's conclusion finds no support in this Court's Eighth Amendment case law.

Before turning to *Green*, the Oregon Supreme Court majority considered the specific evidence at issue in *Lockett* and the companion case, *Bell v. Ohio*, 438 U.S. 637 (1978). In *Lockett*, the jury found the defendant guilty of aggravated murder based on her participation in a robbery and not on her role in actually causing the victim's death. 438 U.S. at 589-93. In the sentencing proceeding, the defendant offered evidence about her minor

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implication of the court's holding that the alibi evidence is admissible is that capital defendants in this and other penalty-phase proceedings will be permitted both to submit evidence that would negate guilt and to argue, on the basis of that evidence, that the defendant should not receive the death penalty.

role in the robbery and this Court focused on whether the state statutory scheme permitted the sentencing judge to consider that evidence. This Court concluded that the statutory scheme violated the Eighth Amendment because the sentencing judge was not permitted to consider "a defendant's comparatively minor role in the offense, or age." *Id.* at 608.

The evidence at issue in *Bell* was similar to the evidence in *Lockett*. Again, the jury found the defendant guilty of aggravated murder based on his participation in a kidnapping that resulted in the murder. *Bell*, 438 U.S. at 639-40. The defendant offered evidence in the sentencing proceeding to demonstrate his minor role in the kidnapping. *Id.* at 641. This Court overturned his sentence because the state statutory scheme prevented the sentencing court "from considering the particular circumstances of his crime and aspects of his character and record as mitigating factors." *Id.* at 642.

The majority in the Oregon Supreme Court recognized that the alibi evidence in this case is distinguishable from the evidence at issue in *Lockett* and *Bell*:

> [W]e acknowledge that the juries in *Lockett* and *Bell* appear to have based their respective guilty verdicts for capital murder on factual findings that the defendants actively had participated in the underlying felonies of aggravated robbery (*Lockett*) and aggravated kidnapping (*Bell*), which, by operation of state law, allowed the juries also to find the defendants guilty of capital murder. Such guilt-phase findings therefore would have left open the possibility that proffered sentencing-phase evidence that the defendants had

> not intended to kill the victims, or otherwise had played only peripheral parts in the underlying felonies (although with the requisite intent respecting those felonies), would mitigate against imposition of the death penalty, notwithstanding the earlier capital murder convictions. Defendant in this case, by contrast, was convicted of the aggravated murders . . . of both victims. Defendant's alibi evidence was inconsistent with those convictions; by contrast, the mitigating evidence at issue in *Lockett* and *Bell* was consistent with the underlying convictions, because the defendants could have been convicted of capital crimes notwithstanding their lessened culpability respecting the capital murders.

Pet. App. 57-58.

Despite this distinction, the *Guzek III* majority concluded that this Court's case law required a significantly broader reading of the "circumstances of the offense," one that would encompass much more than the kind of evidence at issue in *Lockett* and *Bell*. The *Guzek III* majority reached this conclusion based almost entirely on its reading of *Green*.

In *Green*, the defendant wanted to introduce the hearsay testimony of a witness who had testified for the state in a co-defendant's prior separate trial. 442 U.S. at 96. The witness would have testified on Green's behalf that the co-defendant had confessed that he caused the victim's death. This Court held that the evidence was relevant at Green's sentencing phase and that its exclusion violated the Due Process Clause. The *Guzek III* majority read *Green* to hold that, "under *Lockett*, [Green's] evi-

dence that he had not participated in the murder was a relevant circumstance of the offense that the sentencer must consider, notwithstanding that the defendant already had been convicted of the victim's murder." Pet. App. 60. Because nothing in this Court's or the Georgia Supreme Court's description of the case revealed that Green had been convicted of felony murder or on an aid-and-abet theory of guilt, the *Guzek III* majority concluded that Green, unlike Lockett and Bell, had been convicted on a theory of murder that depended on his personally causing the victim's death. Pet. App. 58-59. The majority concluded that the facts in this case "appear to be analogous" to the facts in *Green*, and it therefore determined that the Eighth Amendment requires that the jury consider alibi evidence in a penalty-phase proceeding. Pet. App. 60-61.

For the *Guzek III* dissent, the distinction between the evidence at issue in *Lockett* and *Bell* and the alibi evidence in this case was critical in leading them to the opposite conclusion: that the Eighth Amendment does not require the sentencing jury to hear alibi evidence because it challenges the conviction itself and does not merely attempt to reduce the defendant's moral culpability. The *Guzek III* dissent disagreed with the majority's conclusion that *Green* demands the broad definition of constitutionally relevant mitigating evidence that the majority adopted in this case.

As a starting point, the *Guzek III* dissent disagreed with the majority that the evidence in *Green* differed meaningfully from the evidence in *Lockett* and *Bell*. The dissent focused on this Court's description in *Green* that

"[t]he evidence at trial tended to show that [Green] and Moore abducted [the victim] from the store where she was working alone and, acting either in concert or separately, raped and murdered her." *Green*, 442 U.S. at 96. To the *Guzek III* dissent, this description sounded like felony murder. Pet. App. 73-74. Moreover, felony murder "would make sense from the state's perspective in *Green*."[14] Pet. App. 74-75. Finally, the dissent concen-

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[14] Under Georgia's statutory scheme at the time, the crime of murder was defined as including felony murder and "malice murder." Following a determination of guilt, the jury would then consider additional evidence, and it needed to find one or more of the statutory aggravating circumstances to impose a death sentence. *See Gregg*, 428 U.S. at 162-66 (1976) (describing Georgia's statutory scheme for the imposition of the death penalty). In Green's case, the jury found him guilty of murder and, in the pre-sentence hearing, found two statutory aggravating circumstances: (1) the offense of murder was committed while Green was engaged in the commission of kidnapping and armed robbery and (2) the offense of murder was outrageously and wantonly vile, horrible and inhumane in that it involved the torture of the victim and depravity of mind on the part of the defendant. *Green v. State*, 242 Ga. 261, 270, 274, 249 S.E.2d (1978). The dissent in the Oregon Supreme Court appears correct in understanding the circumstances in *Green* as similar to those in *Lockett* and *Bell*. Other courts, too, have read *Green* as factually similar to *Lockett* and *Bell*. *See State v. Fletcher*, 354 N.C. 455, 473, 555 S.E.2d 534, 545 (2001), *cert. den.* 537 U.S. 846 (2002) ("The excluded evidence suggesting that the defendant did not personally kill the victim was consistent with the guilty verdict in *Green* . . . and would not have prompted the jury . . . to consider residual doubt.").

trated on *Green*'s citation to Justice Blackmun's concurrence in *Lockett*:

> The Court's citation to Justice Blackmun's concurrence is revealing, because, in *Lockett*, Justice Blackmun took a narrower approach than the plurality. He would have held only that a state court may not sentence an aider-and-abettor to death without allowing the sentencer to consider the extent of that person's involvement, and degree of *mens rea*, in the commission of the homicide. *Lockett*, 438 U.S. at 614. By citing Justice Blackmun's concurrence and its discussion of aiding-and-abetting liability, the Court reveals that the "critical issue" in *Green* is whether a defendant—who, along with a codefendant, has been found guilty of murder—may show that his *relative* culpability for the crime is minimal because he neither participated in the killing nor intended it to occur.

Pet. App. 75 (emphasis in original).

Thus, for the dissent, the evidence at issue in *Green* was akin to the evidence at issue in *Lockett* and *Bell*. In all three cases, the proffered mitigation evidence was relevant to establish the defendant's relative moral culpability, not to disprove his legal culpability. If that is accurate—and the State agrees with the dissent on this point—the difference between the alibi evidence at issue in this case and the evidence at issue in this Court's prior cases effectively eliminates the central prop of the Oregon Supreme Court majority's reasoning. Without a factual similarity between the evidence in *Green* and the alibi evidence in this case, there is little in the form of al-

ternate reasoning that would support the *Guzek III* majority's holding in this case.

It is worth noting the other criticisms that the *Guzek III* dissent made of the majority's reliance on *Green*, as these provide additional reasons for rejecting the majority's analysis and conclusion. The *Guzek III* majority relied on this Court's statement in *Green* that the evidence at issue "was highly relevant to a critical issue in the punishment phase of the trial." Pet. App. 60-62 (quoting *Green*, 442 U.S. at 97). Again based on its view of *Green* as factually similar to *Lockett* and *Bell*, the *Guzek III* dissent read this statement in *Green* as saying nothing different from what the Court previously said in *Lockett*. In both *Lockett* and *Bell*, the testimony was relevant because it went to the defendant's moral culpability—whether he was a minor participant in the crime—an issue that is unquestionably relevant in the sentencing phase. Pet. App. 76-77. Finally, the *Guzek III* dissent emphasized the other differences between *Green* and this case: *Green* is based on the Due Process Clause, not the Eighth Amendment; in *Green*, the State had relied on the evidence (a codefendant's confession) to convict the codefendant; the State in *Green* invited the jury to infer that Green was a direct participant in the killing, but prevented Green from offering this evidence to counter the State's argument; and this Court issued a very brief opinion in *Green* that took pains to limit its holding to the facts of that case. Pet. App. 77-79.

The *Guzek III* dissent's criticisms of the majority's reliance on *Green* are compelling. No other court has read *Green* in the same way as the Oregon Supreme

Court. It would be sufficient to conclude that the Oregon Supreme Court simply misconstrued the factual circumstances in *Green* and, because the result depends so heavily on that construction, to reverse the state court's conclusion on that ground alone. But, even if the *Guzek III* majority is correct in its reading of the factual circumstances in *Green*, the state court's conclusion simply cannot be squared with this Court s narrower view of the Eighth Amendment mitigation requirement. As described above, the underlying purpose of that requirement is to ensure that the sentencer considers evidence of the defendant's moral culpability; it does not extend to requiring the sentencer to consider alibi evidence or other evidence that is relevant only to the defendant's legal culpability or guilt.

Even more problematic for the *Guzek III* majority than its reliance on *Green* is its failure to acknowledge this Court's reasoning in *Franklin*. The state court attempted to distinguish between the residual-doubt evidence in *Franklin* and the alibi evidence in this case as follows:

> We note that, in *Franklin v. Lynaugh*, 487 U.S. 164, 172, 174, *reh'g den*, 487 U.S. 1263 (1988), a plurality of the Supreme Court strongly suggested, and the concurrence would have held, that the Eighth Amendment does not require an *instruction* that a penalty-phase jury consider any *residual or lingering doubts* remaining from the guilt phase. *Id.* at 187-88 (O'Connor, J., concurring). However, nothing in that decision lessened the direction from *Lockett*, *Bell*, *Eddings*, and *Green* that the Eighth Amendment *does*

> require that a defendant be permitted to *introduce*, and a jury be able to consider, *mitigating evidence relevant to any circumstances of the offense*, such as evidence that would lessen the defendant's culpability in the offense. Simply stated, a "residual" or "lingering doubt[]" remaining from the guilt phase, *Franklin*, 487 U.S. at 174, is qualitatively different from actual "evidence" proffered during the penalty phase.

Pet. App. 62-63 n. 30 (emphasis in original).

It is unclear how this "distinction" makes any difference in the analysis of this case.[15] It is true that defendant could argue, if alibi evidence is admitted, either that the jury should determine that he is not guilty of the crimes for which he has been convicted or, alternatively, that the jury should merely consider lingering doubts about his guilt in making the sentencing determination. But in either case, the evidence is constitutionally relevant only if it concerns a "circumstance of the offense." And, in either case, the only decision the jury can make, if it is persuaded by defendant's "alibi" argument, is to impose a

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[15] The Oregon Supreme Court casts *Green*, along with *Lockett*, *Bell* and *Eddings*, as part of the pertinent body of case law at the time this Court decided *Franklin*. But it is worth noting that this Court did not cite *Green* in *Franklin*. If the Oregon Supreme Court is correct in construing *Green* to hold that "the defendant's evidence that he had not participated in the murder was a relevant circumstance of the offense that the sentencer must consider, notwithstanding that the defendant already had been convicted of the victim's murder[,]" Pet. App. 60, it seems an unusual omission, especially from Justice O'Connor's concurrence.

severe sentence of life in prison instead of a sentence of death. But if the jury is truly persuaded by the defendant's alibi evidence, even a sentence of life in prison is unwarranted. Because of the limited role the sentencing jury plays in the penalty phase, defendant's alibi evidence is not relevant, whether it is introduced as evidence or used in argument to the jury, and whether it is or is not accompanied by a jury instruction.

V. This Court should reject the Oregon Supreme Court's holding that the Eighth Amendment gives a capital defendant the right to present evidence and argument at sentencing that would call into question the defendant's guilt.

The Oregon Supreme Court's holding permits any capital defendant to offer alibi evidence and argument in the penalty phase that is related not to the defendant's specific role in the offense, but instead calls into question the defendant's guilt. Under that holding, the alibi evidence can be used either to directly challenge the defendant's guilt or as part of a residual-doubt argument asking the jury to consider lingering doubt when determining the appropriate penalty. Either way, the evidence is not required by the Eighth Amendment.

First, it is important to note that the impact of the Oregon Supreme Court's holding is not limited to alibi evidence. The court's reasoning appears to encompass any evidence a capital defendant offers in mitigation that directly challenges the defendant's guilt. As the *Guzek III* dissent noted, "it is conceivable that, after this opinion, scientific evidence challenging the accuracy of eyewitness testimony or fingerprint evidence admitted during

the guilt phase could be considered relevant to a 'circumstance of the offense.'" Pet. App. 84 n. 34. Broad reliance on this holding will greatly expand the scope, complexity, and cost of penalty-phase trials. Most importantly, it will expand the penalty phase to encompass issues not appropriate for the sentencer's consideration.

If the evidence is presented to establish innocence, it is not related to any question the jury must answer in the penalty phase. As discussed above, the Eighth Amendment requires an individualized determination of whether death is the appropriate sentence, but it does not expand the penalty phase into a new opportunity to litigate guilt. Although the threshold for constitutionally relevant mitigation evidence is low, the state court's holding conflicts with this Court's repeated statement that the Eighth Amendment mitigation requirement does not override the States' ability to exclude evidence as irrelevant. *See, e.g.*, *Lockett*, 438 U.S. at 604 n. 12 ("Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense."). If evidence challenging the defendant's guilt is somehow relevant to the question of the appropriate penalty, the State's traditional authority to exclude irrelevant evidence offered in mitigation is largely illusory.

Moreover, expanding the penalty-phase proceeding to include relitigation of the defendant's guilt potentially raises questions about the validity of the defendant's conviction. But the Oregon Supreme Court has affirmed defendant's conviction, *Guzek I*, and it is not subject to attack in this proceeding. To present the sentencing jury

with evidence directed to a point it cannot consider can only lead to confusion about the jury's role in the remanded penalty-phase proceeding. As the Ohio Supreme Court stated in *McGuire*, 80 Ohio St. 3d at 403, 686 N.E.2d at 1123:

> Our system requires that the prosecution prove all elements of a crime beyond a reasonable doubt. Therefore, it is illogical to find that the defendant is guilty beyond a reasonable doubt, yet then doubt the certainty of the guilty verdict by recommending mercy in case a mistake has occurred. . . . Residual doubt casts a shadow over the reliability and credibility of our legal system in that it allows the jury to second-guess its verdict of guilt in the separate penalty phase of a murder trial. "Thus, if residual doubt is reasonable and not simply possible or imaginary, then an accused should be acquitted, and not simply have his death sentence reversed."

(Citations omitted). In a similar vein, the Florida Supreme Court stated, "A convicted defendant cannot be 'a little bit guilty.' It is unreasonable for a jury to say in one breath that a defendant's guilt has been proven beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy." *Buford v. State*, 403 So. 2d 943, 953 (Fla. 1981), *cert. den.* 454 U.S. 1163 (1982).

In addition to creating confusion in the penalty-phase proceeding, this second-guessing of the verdict could create special difficulties in state collateral-review and federal habeas corpus proceedings. If the sentencing jury is persuaded by the alibi evidence, it nevertheless is lim-

ited to imposing a life sentence for defendant's conviction. In a collateral-review or federal habeas corpus proceeding, the sentencing jury's view of defendant's guilt does not necessarily establish a legal basis for overturning his conviction, which was properly established before the guilt-phase jury beyond a reasonable doubt. There is no confusion if the sentencing jury is presented only with evidence relevant to determining the appropriate sentence and defendant's guilt is not put at issue.

A capital defendant could argue that evidence like the alibi evidence in this case is not presented to establish innocence, but is presented simply to raise doubts about guilt, and to support an argument that any lingering or residual doubt weighs against imposing the death penalty. Although the *Guzek III* majority's attempt to distinguish *Franklin* suggests the faint possibility that it would view the Eighth Amendment as not entitling a defendant to make such an argument, it is difficult to understand how that distinction could be drawn. In any event, alibi evidence is irrelevant even if used this way because it does not help the jury make an individualized determination about the defendant's moral culpability. Rather, it improperly attacks the defendant's legal culpability.

Moreover, using alibi evidence as a basis to argue that the jury should consider residual doubt about the defendant's guilt in determining the appropriate sentence could raise questions about whether the practice of a limited remand of a death sentence is constitutional, as Justice White noted in *Franklin*:

> Finding a constitutional right to rely on a guilt-phase jury's "residual doubts" about innocence when

> the defense presents its mitigating case in the penalty phase is arguably inconsistent with the common practice of allowing penalty-only trials on remand of cases where a death sentence—but not the underlying conviction—is struck down on appeal. . . .
>
> In fact, this Court has, on several previous occasions, suggested such a method of proceeding on remand. . . .
>
> In sum, we are quite doubtful that such "penalty-only" trials are violative of a defendant's Eighth Amendment rights. Yet such is the logical conclusion of petitioner's claim of a constitutional right to argue "residual doubts" to a capital sentencing jury.

487 U.S. at 173-74 n. 6.

Equally important, no matter how the alibi evidence is used in the penalty phase, the Oregon Supreme Court's holding could effectively raise the State's burden in capital cases. If the defendant is permitted to argue that jurors, who already have found the defendant guilty beyond a reasonable doubt, should consider any lingering doubt in the sentencing phase, the State will be placed in the difficult position of attempting to overcome what some have referred to as "whimsical" doubt. *Holland*, 705 So. 2d at 325 ("Holland argues that our caselaw requires the trial court to permit his presentation of evidence on whimsical or residual doubt. Our caselaw has prohibited counsel from doing more than asserting whimsical doubt at closing argument."). Justice O'Connor directly addressed that issue in her concurring opinion in *Franklin*:

> Petitioner's "residual doubt" claim is that the States must permit capital sentencing bodies to demand proof of guilt to "an absolute certainty" before imposing the death sentence. Nothing in our cases mandates the imposition of this heightened burden of proof at capital sentencing.

Franklin, 487 U.S. at 188. Those who advocate consideration of residual doubt recognize that it would raise the State's burden. *See, e.g.*, Treadway, Note: *"Residual Doubt" in Capital Sentencing: No Doubt it Is an Appropriate Mitigating Factor*, 43 Case W. Res. L. Rev. 215 (1992). While it may be an appropriate matter for discussion among policy makers, nothing in this Court's jurisprudence suggests that the Eighth Amendment requires this heightened burden on the State.

Whether offered as proof of innocence or as a basis to argue that residual doubt about guilt mitigates against imposition of the death penalty, the Oregon Supreme Court's holding is inconsistent with this Court's case law addressing the Eighth Amendment mitigation requirements and defining what circumstances of the offense must be considered in mitigation. Viewed in context of the reason for the Eighth Amendment mitigation requirement, "circumstances of the offense" must be limited to evidence that aids the jury in making the individualized assessment of the defendant's moral culpability and whether the defendant should receive the death penalty. Requiring that the jury revisit arguments about the defendant's legal culpability does not aid the jury in carrying out its duties in the selection phase of a capital sentencing proceeding.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Oregon Supreme Court.

Respectfully submitted,

HARDY MYERS
Attorney General of Oregon
PETER SHEPHERD
Deputy Attorney General
MARY H. WILLIAMS
Solicitor General
Counsel for Petitioner
State of Oregon

July 22, 2005

Or. Rev. Stat. § 135.455

(1) If the defendant in a criminal action proposes to rely in any way on alibi evidence, the defendant shall, not less than five days before the trial of the cause, file and serve upon the district attorney a written notice of the purpose to offer such evidence, which notice shall state specifically the place or places where the defendant claims to have been at the time or times of the alleged offense together with the name and residence or business address of each witness upon whom the defendant intends to rely for alibi evidence. If the defendant fails to file and serve such notice, the defendant shall not be permitted to introduce alibi evidence at the trial of the cause unless the court for good cause orders otherwise.

(2) As used in this section "alibi evidence" means evidence that the defendant in a criminal action was, at the time of commission of the alleged offense, at a place other than the place where such offense was committed.

Or. Rev. Stat. § 136.535

Except that a new trial may not be granted on application of the state, ORS 19.430 and ORCP 64 A, B and D to G apply to and regulate new trials in criminal actions.

Or. Rev. Stat. § 163.150

(1)(a) Upon a finding that the defendant is guilty of aggravated murder, the court, except as otherwise provided in subsection (3) of this section, shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to life imprisonment, as described in ORS 163.105(1)(c), life imprisonment without the possibility of release or parole, as described in ORS 163.105(1)(b), or death. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. If a juror for any

reason is unable to perform the function of a juror, the juror shall be dismissed from the sentencing proceeding. The court shall cause to be drawn the name of one of the alternate jurors, who shall then become a member of the jury for the sentencing proceeding notwithstanding the fact that the alternate juror did not deliberate on the issue of guilt. The substitution of an alternate juror shall be allowed only if the jury has not begun to deliberate on the issue of the sentence. If the defendant has pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence including, but not limited to, victim impact evidence relating to the personal characteristics of the victim or the impact of the crime on the victim's family and any aggravating or mitigating evidence relevant to the issue in paragraph (b)(D) of this subsection; however, neither the state nor the defendant shall be allowed to introduce repetitive evidence that has previously been offered and received during the trial on the issue of guilt. The court shall instruct the jury that all evidence previously offered and received may be considered for purposes of the sentencing hearing. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Oregon. The state and the defendant shall be permitted to present arguments for or against a sentence of death and for or against a sentence of life imprisonment with or without the possibility of release or parole.

(b) Upon the conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(A) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that death of the deceased or another would result;

(B) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;

(C) If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased; and

(D) Whether the defendant should receive a death sentence.

(c)(A) The court shall instruct the jury to consider, in determining the issues in paragraph (b) of this subsection [the four questions the jury must answer], any mitigating circumstances offered in evidence, including but not limited to the defendant's age, the extent and severity of the defendant's prior criminal conduct and the extent of the mental and emotional pressure under which the defendant was acting at the time the offense was committed.

(B) The court shall instruct the jury to answer the question in paragraph (b)(D) of this subsection "no" if, after considering any aggravating evidence and any mitigating evidence concerning any aspect of the defendant's character or background, or any circumstances of the offense and any victim impact evidence as described in paragraph (a) of this subsection, one or more of the jurors believe that the defendant should not receive a death sentence.

(d) The state must prove each issue submitted under paragraph (b)(A) to (C) of this subsection beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue considered.

(e) The court shall charge the jury that it may not answer any issue "yes," under paragraph (b) of this subsection unless it agrees unanimously.

(f) If the jury returns an affirmative finding on each issue considered under paragraph (b) of this subsection, the trial judge shall sentence the defendant to death.

(2)(a) Upon the conclusion of the presentation of the evidence, the court shall also instruct the jury that if it reaches a negative finding on any issue under subsection (1)(b) of this section, the trial court shall sentence the defendant to life imprisonment without the possibility of release or parole, as described in ORS 163.105(1)(b), unless 10 or more members of the jury further find that there are sufficient mitigating circumstances to warrant life imprisonment, in which case the trial court shall sentence the defendant to life imprisonment as described in ORS 163.105(1)(c).

(b) If the jury returns a negative finding on any issue under subsection (1)(b) of this section and further finds that there are sufficient mitigating circumstances to warrant life imprisonment, the trial court shall sentence the defendant to life imprisonment in the custody of the Department of Corrections as provided in ORS 163.105(1)(c).

(3)(a) When the defendant is found guilty of aggravated murder, and ORS 137.707(2) applies or the state advises the court on the record that the state declines to present evidence for purposes of sentencing the defendant to death, the court:

(A) Shall not conduct a sentencing proceeding as described in subsection (1) of this section, and a sentence of death shall not be ordered.

(B) Shall conduct a sentencing proceeding to determine whether the defendant shall be sentenced to life imprisonment without the possibility of release or parole as described in ORS 163.105(1)(b) or life im-

prisonment as described in ORS 163.105(1)(c). If the defendant waives all rights to a jury sentencing proceeding, the court shall conduct the sentencing proceeding as the trier of fact. The procedure for the sentencing proceeding, whether before a court or a jury shall follow the procedure of subsection (1)(a) of this section, as modified by this subsection.

(b) Following the presentation of evidence and argument under paragraph (a) of this subsection, the court shall instruct the jury that the trial court shall sentence the defendant to life imprisonment without the possibility of release or parole as described in ORS 163.105(1)(b), unless after considering all of the evidence submitted, 10 or more members of the jury find there are sufficient mitigating circumstances to warrant life imprisonment with the possibility of parole as described in ORS 163.105(1)(c). If 10 or more members of the jury find there are sufficient mitigating circumstances to warrant life imprisonment with the possibility of parole, the trial court shall sentence the defendant to life imprisonment as described in ORS 163.105(1)(c).

(c) Nothing in this subsection shall preclude the court from sentencing the defendant to life imprisonment, as described in ORS 163.105(1)(c), or life imprisonment without the possibility of release or parole, as described in ORS 163.105(1)(b), pursuant to a stipulation of sentence or stipulation of sentencing facts agreed to and offered by both parties if the defendant waives all rights to a jury sentencing proceeding.

(4) If any part of subsection (2) of this section is held invalid and as a result thereof a defendant who has been sentenced to life imprisonment without possibility of release or parole will instead be sentenced to life imprisonment in the custody of the Department of Corrections as

provided in ORS 163.105(2), the defendant shall be confined for a minimum of 30 years without possibility of parole, release on work release or any form of temporary leave or employment at a forest or work camp. Subsection (2) of this section shall apply only to trials commencing on or after July 19, 1989.

(5) Notwithstanding subsection (1)(a) of this section, if the trial court grants a mistrial during the sentencing proceeding, the trial court, at the election of the state, shall either:

(a) Sentence the defendant to imprisonment for life in the custody of the Department of Corrections as provided in ORS 163.105(1)(c); or

(b) Impanel a new sentencing jury for the purpose of conducting a new sentencing proceeding to determine if the defendant should be sentenced to:

(A) Death;

(B) Imprisonment for life without the possibility of release or parole as provided in ORS 163.105(1)(b); or

(C) Imprisonment for life in the custody of the Department of Corrections as provided in ORS 163.105(1)(c).

Or. Rule Civ. Proc. 64

A. A new trial is a reexamination of an issue of fact in the same court after judgment.

B. A former judgment may be set aside and a new trial granted in an action where there has been a trial by jury on the motion of the party aggrieved for any of the following causes materially affecting the substantial rights of such party:

B(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of dis-

cretion, by which such party was prevented from having fair trial.

B(2) Misconduct of the jury or prevailing party.

B(3) Accident or surprise which ordinary prudence could not have guarded against.

B(4) Newly discovered evidence, material for the party making the application, which such party could not with reasonable diligence have discovered and produced at the trial.

B(5) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

B(6) Error in law occurring at the trial and objected to or excepted to by the party making the application.

*****

Supreme Court, U.S.
FILED
JUL 21 2005
OFFICE OF THE CLERK

No. 04-928

In the Supreme Court of the United States

STATE OF OREGON,

Petitioner,

v.

RANDY LEE GUZEK,

Respondent.

Petition for Writ of Certiorari to the Oregon Supreme Court

JOINT APPENDIX VOLUME I

HARDY MYERS
Attorney General of Oregon
PETER SHEPHERD
Deputy Attorney General
***MARY H. WILLIAMS**
Solicitor General
400 Justice Building
Salem, Oregon 97301-4096
Phone: (503) 378-4402
Counsel for Petitioner

***RICHARD L. WOLF**
Attorney at Law
12940 NW Marina Wy Slip A
Portland, Oregon 97231
Phone: (503) 384-0910
Counsel for Respondent

*Counsel of Record

PETITION FOR CERTIORARI FILED January 5, 2005
CERTIORARI GRANTED April 25, 2005

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Deschutes County Circuit Court

Case# 87CR0373TM Oregon State of/Guzek Randy Lee
Offense Felony – Aggravated Murder

Case Filed Date 7/10/87	Starting Instrument Indictment
Case Started Date 7/16/87	Originating From Original filing
1st Appearance Date 7/16/87	Originating Agency
Ready for Trial	Originating Agency#
First Setting Date 2/01/88	Previous Court
Trial Scheduled Date	Previous Court Case #
Trial Start Date	Previous Decision
Length of Trial 17 D	Master Case Number
Disposition Date 7/25/91	Relation to Master
Final Order Date 4/06/98	Termination Stage
Reinstated Date 2/26/96	Termination Type
Citation in Lieu #	Judgment Type
District Attorney	Judgment Status
Booking#	Judgment Volume/Page

___ **Role** _____	**Plaintiff** _____	**Attorney**
1 **Plaintiff**	**Oregon State of**	**Marquis Joshua**

___ **Role** _____	**Defendant**	
1 **Defendant**	**Guzek Randy Lee**	**Birth Dt**
Sex		Hght/Wght
Drivers License		Hair
Phone#		Eyes
Control#		Race
Address		

6	Crt Appntd	Mallon Gordon	Bar# 84282
7	Crt Appntd	Rader Mark S.	Bar# 73241

1 ORS 163095 Aggravated Murder–A/DEA
Incident Date 7/10/87
Date Charged/Issued 7/10/87 Citation#
Current Plea Security
Disposition 7/25/91 Convicted Plate#

10 Judgment Date
7/25/91

Status
Judge Mosgrove Thomas M Signed
Sentenced To Death 7/25/91
JUDGMENT VACATED
11-8-04

2 ORS 163095 Aggravated Murder–A/DEA
Incident Date 7/10/87
Date Charged/Issued 7/10/87 Citation#
Current Plea Security
Disposition 7/25/91 Convicted Plate#

12 Judgment Date
7/25/91

Status
Judge Mosgrove Thomas M Signed
7/25/91

Sentenced To Death Signed
7/25/91

3 ORS 163095 Aggravated Murder–A/DEA
Incident Date 7/10/87
Date Charged/Issued 7/10/87 Citation#
Current Plea Security
Disposition 7/25/91 Convicted Plate#

3 Judgment Date
3/21/88

Status
Judge Mosgrove Thomas M — Signed
CONVICTION VACATED. — 3/18/88

4 ORS 163095 Aggravated Murder–A/DEA
Incident Date 7/10/87
Date Charged/Issued 7/10/87 — Citation#
Current Plea — Security
Disposition 7/25/91 Convicted — Plate#

4 Judgment — Date 3/21/88

Status
Judge Mosgrove Thomas M — Signed
CONVICTION VACATED. — 3/18/88

5 ORS 163095 Aggravated Murder–A/DEA
Incident Date 7/10/87
Date Charged/Issued 7/10/87 — Citation#
Current Plea — Security
Disposition 7/25/91 Convicted — Plate#

5 Judgment — Date 3/21/88

Status
Judge Mosgrove Thomas M — Signed
CONVICTION VACATED. — 3/18/88

6 ORS 164415 Robbery-1–A/FEL
Incident Date 7/10/87
Date Charged/Issued 7/10/87 — Citation#
Current Plea — Security
Disposition 7/25/91 Convicted — Plate#

6 Judgment — Date 3/21/88

Status
Judge Mosgrove Thomas M — Signed
CONVICTION VACATED. — 3/18/88

7 ORS 164415 Robbery-1–A/FEL
Incident Date 7/10/87
Date Charged/Issued 7/10/87 — Citation#
Current Plea — Security
Disposition 7/25/91 Convicted — Plate#

7 Judgment — Date 3/21/88

Status
Judge Mosgrove Thomas M — Signed
CONVICTION VACATED. — 3/18/88

8 ORS 164225 Burglary-1 – A/FEL
Incident Date 7/10/87
Date Charged/Issued 7/10/87 — Citation#
Current Plea — Security
Disposition 7/25/91 Convicted — Plate#

8 Judgment — Date 3/21/88

Status
Judge Mosgrove Thomas M — Signed
CONVICTION VACATED. — 3/18/88

9 ORS 164055 Theft-1 – C/FEL
Incident Date 7/10/87
Date Charged/Issued 7/10/87 — Citation#
Current Plea — Security
Disposition 7/25/91 Convicted — Plate#

9	Judgment		Date 3/21/88
	Status		
	Judge Mosgrove Thomas M		Signed
	CONVICTION VACATED.		3/18/88

___	**Role** _____	**Other People** _____	**Attorney**
1	Reporter	Eusebio Gene	
2	Reporter	Callaghan Cadrolyn	
3	Reporter	Dahlke Sharon	
4	Reporter	Dickinson Dalee	
5	Reporter	Roberts Janet	
6	Reporter	Butler Caroylyn	
7	Reporter	Wilson Kelley	
8	Reporter	Fagan Mary	
9	Reporter	Irvin Liz	
10	Reporter	Behrens Carri	
11	Reporter	Wilson Cindi	

RELEVANT DOCKET ENTRIES

DOCKET NUMBER	ENTER DATE	FILE DATE	EVENT/FILING/ PROCEEDING
1	7/20/87	7/10/87	Indictment
3	7/20/87	7/16/87	Return of Service Warrant
4	7/20/87	7/20/87	Arraignment Scheduled
5	7/20/87	7/15/87	Complaint Amended
6	7/20/87	7/16/87	Arraignment
132	1/21/88	1/12/88	Notice of intent to rely on alibi evidence
133	1/21/88	1/15/88	Notice (amended) of intent to rely on alibi evidence

DOCKET NUMBER	ENTER DATE	FILE DATE	EVENT/FILING/ PROCEEDING
645	8/22/97	8/20/97	Notice of intent to rely on evidence of alibi as mitigating evidence
647	8/22/97	8/20/97	Notice of intent to rely on evidence of alibi as mitigating evidence (Filed by Randy Lee Guzek)
746	10/20/97	10/09/97	Motion to make record complete by reassertion and incorporation (Filed by Randy Lee Guzek
833	12/12/97	10/21/97	Memorandum in support of admissibility of mitigating evidence
872	12/12/97	10/24/97	Memorandum in support of admissibility of mitigating evidence
884	12/12/97	10/30/97	Memorandum in support of admissibility of mitigating evidence
891	12/12/97	11/04/97	Order to make record complete by reassertion and incorporation (Signed 11/4/97 by Judge Pierre Van Rysselberghe)

Oregon Supreme Court

Case# S45272 Oregon State of/Guzek Randy Lee
Appeal Death Sentence

Case Filed Date 4/23/98
Case Started Date 4/23/98
At Issue Date 12/10/01
Argued/Submit Date 1/11/02

Starting Instrument Appellate Notice Filing
Originating From Lower court appeal
Previous Court Deschutes Co Circuit Court
Previous Court Case #87CR0373TM
PrevCourt Dcsn 12/12/97
Master Case Number
Relation to Master
Decision Other

Dcsn/Dismiss Date 3/04/04
Apl/Jdgmt/Close Date 11/5/04
Reinstated Date

___	Role	_____	Plaintiff	_____	Attorney/Bar Number
1	Plaintiff		Oregon State of		Rocklin Robert B 90369 Moan Rolf C 92407 Vance Holly Ann 97103

___	Role	_____	Defendant	_____	Attorney/Bar Number
1	Defendant		Guzek Randy Lee		Guzek Randy Lee Hunt John Kevin 84252 Wolf Richard L 87371

___	Role	_____	Other People	___	Attorney/Bar Number
1	RPT	INAC	Deschutes Transcript Coordinator		

2	RPT	INAC	Caverhill Mary Lou
3	RPT	INAC	Bonkosky Amy
4	RPT	INAC	Phillips Linda
5	RPT	INAC	Clark Pam
6	RPT	INAC	Lundgren Margie
7	RPT	INAC	Rudishauser Cindy
8	Reporter		Brookhart Liz
9	Reporter		Nutting Karen
10	Reporter		Pruitt Mona

RELEVANT DOCKET ENTRIES

DOCKET NUMBER	ENTER DATE	FILE DATE	EVENT/FILING/ PROCEEDING
1	4/27/98	4/23/98	Appellate Notice Filing AUTOMATIC REVIEW; TRPF 60 DA IMP 8 & IMP 9;6/22/98 (Judge Pierre Van Rysselberghe) Related event #4
2	4/27/98	12/12/97	Decision – Previous Court
3	4/27/98	4/27/98	Letter of Supreme Court TO GUZEK, R; RIGHT TO APPOINTED COUNSEL IF INDIGENT; RQ CMPLTD AFIN RTRND TO SC 14DA; LET SC KNOW IF REPRESENTED BY COUNSEL
28	1/10/00	1/06/00	Motion INCORPORATE PRIOR ASSIGNMENTS OF

DOCKET NUMBER	ENTER DATE	FILE DATE	EVENT/FILING/ PROCEEDING
			ERROR, APP & ARGU BY BY REFERENCE IN BROP (Filed by John Kevin Hunt) (Denied 1/19/00)
30	1/11/00	1/11/00	Answer Motion (Filed by Robert B. Rocklin) Related event #28
31	1/14/00	1/11/00	Motion FOR SUPERVISORY ORDER (Filed by John Kevin Hunt) (Denied 2/01/00) Related event #34
32	1/19/00	1/19/00	Order Supreme Court DENY MO INCORP; ALLOW EXTENDED BROP Related event #28 Related event #29
34	2/01/00	2/01/00	Order Supreme Court DENY MOTION Related event #31
62	10/11/00	10/10/00	Brief Opening W/SEPARATE VOL 2 (APPENDICES) BRRS ATY1 ~~90 D~~A 1/8/01 CTA Hunt John Kevin
86	12/11/01	12/10/01	Brief Respondent AAG Rocklin Robert B AAG Moan Rolf C

DOCKET NUMBER	ENTER DATE	FILE DATE	EVENT/FILING/ PROCEEDING
			AAG Vance Holly Ann
87	12/11/01	12/10/01	Issue/at Issue
88	12/11/01	12/11/01	Hearing Oral Argument Scheduled 1/11/02 8:45 am
91	12/31/01	12/28/01	Additional Authorities CTA Cumfer Eric M
95	1/10/02	1/10/02	Additional Authorities AAG Moan Rolf C
96	1/11/02	1/11/02	Argument
100	5/19/03	5/15/03	Motion PERMIT SUPPLEMENTAL BRIEFING (Filed by Eric M. Cumfer) (Denied 6/10/03)
102	6/10/03	6/10/03	Order Supreme Court DENY MO FOR SUPPL BRIEFING; DENY MOET TO FI ANMO Related event #100 Related event #101
104	3/04/04	3/04/04	Opinion RIGGS; VAC SENTENCE OF DEATH; REM FOR FURTH PROC; PTRC 3/25/04
105	3/04/04	3/04/04	Opinion Concurring DURHAM
106	3/04/04	3/04/04	Opinion Dissenting

DOCKET NUMBER	ENTER DATE	FILE DATE	EVENT/FILING/ PROCEEDING
			GILLETTE; IN PT; CARSON J JOINED
121	7/02/04	7/01/04	Petition for Reconsideration (Filed by Richard L. Wolf) (Denied 9/8/04) Related event #104
124	9/08/04	9/8/04	Reconsideration Denied KISTLER, J., NOT PARTICIPATING Related event #121
125	9/14/04	9/14/04	Motion STAY ISSUANCE OF JGAL (Filed by John Kevin Hunt) (Denied 10/14/04)
126	10/14/04	10/14/04	Order Supreme Court DENY MO STAY JGAL Related event #125
127	11/05/04	11/05/04	Judgment Appellate
128	11/05/04	11/05/04	Closed
129	12/03/04	12/02/04	Notice TIME EXTENDED IN USSC TO FI PT FOR WRIT OF CERTIORARI BY 1-6-05
130	12/28/04	12/28/04	Notice PT FOR WRIT OF CERTIORARI FI 12/7/04
131	1/10/05	1/10/05	Notice PT FOR WRIT OF CERTIORARI ON USSC

DOCKET NUMBER	ENTER DATE	FILE DATE	EVENT/FILING/ PROCEEDING
			DOCKET AS # 04-928
132	4/44/05	4/21/05	Notice Denying Certiorari 4/18/05; #047698 Related event #131
133	4/28/05	4/28/05	Notice PT FOR WRIT OF CERTIORARI IS GRANTED; MO TO PROCEED IN FORMA PAUPERIS GRANTED IN USSC 4/25/05
134	4/29/05	4/29/05	Letter of Supreme Court RQRC; USSC CERT GRANTED Related event #133
135	5/06/05	5/06/05	Miscellaneous 12FI; 1BX EX @ CAROL'S DESK IF USSC REQUIRES THE RCCD Related event #134
136	6/20/05	6/20/05	Notice PT FOR REHEARING DENIED IN USSC 6/13/05

Transcript of Grand Jury Proceedings October 23, 1987

[Page 1]

MR. BROWN: Today's date is the 23rd of October, 1987. It's about 11:15 a.m. We're in the grand jury room of the Deschutes County District Attorney's office. Present is the Deschutes County Grand Jury inquiring into the matter of the murders of Rod and Lois Houser. I want to inform everyone here that this is being tape recorded.

* * * * *

[Page 121]

KATHLEEN GUZEK, having first been duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. BROWN:

Q. You're Kathleen Guzek?

A. Yes.

Q. And I just wanted to let you know that you're being tape recorded here along with all the other people that have come in.

A. Okay.

Q. And you live out on Walnut Street?

A. Yes.

Q. 4678?

[Page 122]

A. 267

Q. 267 Walnut.

A. Northeast Walnut.

Q. Yes, in Redmond?

A. Yes.

Q. And you're Randy's mother?

A. Uh-huh

* * * * *

[Page 124]

Q. All right. We're particularly interested in where you were and where Randy Guzek was the night of the Houser homicides. When did you first hear about the fact that the Housers had been murdered?

A. I believe on the telephone Randy had told me that somebody had questioned him or talked to him about Ann Houser who's their niece.

Q. Uh-huh.

A. And that was probably – going back it's difficult. I believe it was like Wednesday night. It was the night he had been questioned by some detective. He had called me on the phone and told me that Ann Houser's aunt and uncle had been murdered and that somebody had questioned him [Page 125] in regards to had Ann contacted him or something to that effect.

Q. Uh-huh.

A. And –

Q. Had you read about it in the paper yourself?

A. I do not get a paper so –

Q. Sure.

A. -- that was the first I knew of it is when Randy had called me on the phone. Randy had been questioned.

Q. And you, you knew Ann yourself?

A. She had been at my house one time.

* * * * *

[Page 127]

Q. Okay. What do you remember about the weekend before finding out about the Housers? Before Randy called you and said that the detectives had been over talking to him.

A. We didn't have any reason to go over this until the – Mr. Frederickson had come up the day of the search warrant and that was July 9 I believe?

A. Correct.

Q. And when he was asking Danny his whereabouts I was trying to remember and Danny then was trying to retrace his steps and I was trying to remember and we determined that was the last time I had two days in a row off, in that period of time. I had Sunday and Monday and that Sunday we were burning leaves, Randy and I and it was rather hot and while we were burning leaves Joel and (inaudible) children came up and were over at the big van, I don't know doing what but we were burning leaves and her kids came over and probably –

Q. I'm sorry, which day are we on now, Sunday?

A. Uh-huh.

Q. Okay.

A. And probably (inaudible) it got hot. I got real hot and we kind of shut down the burning and I felt like I was [Page 128] going to have heat stroke so I laid down on the couch. I didn't even wash, I (inaudible).

Q. Sure.

A. And Danny and Willy (inaudible). They wanted to go hiking or they were going to scout up in the Ochocos for deer hunting. (Inaudible) And they went up to scout it out, the area (inaudible).

Q. What time do you think they left?

A. I would assume, just roughly figuring (inaudible).

Q. Okay. What do you recall happening after that?

A. The next thing I recall that day was Randy coming (inaudible) and woke me up. The sun was going down or it was -- I did not look at a clock but it was -- I looked outside and the sun still shown where we burned because I was concerned, so I ask him if would go and water down the hot spots again (inaudible). And we looked out there and I didn't see any but I wanted him to go out and (inaudible). And I told him (inaudible). And he wanted me to go over to his grandfather's house to talk with him because he was going to make a deal, Randy wanted to buy his motor home. I said, I'm just so tired, Randy, I said, why don't you just go on over. And I said, if you need me I can come over later. He went out, I saw him go out and he was over watering down the hot spots and I fell back to sleep.

[Page 129]

Q. You had been asleep before he got there and you fell back to sleep after he went outside?

A. Uh-huh. Yes.

Q. Okay.

A. I fell asleep (inaudible).

Q. Okay. Was anybody else home during this –

A. Not at that point, no.

Q. Okay.

A. After he watered it down he came back and asked again if I wanted to go over with him and I said not now (inaudible). And the next thing I remember is Danny and Willy coming home and they were hungry and wanted me to fix them something to eat. And it was a quarter till 11 (inaudible) that late. And Danny said how about pizza (inaudible) said yeah so Danny went and called Pietro's and he says well we'll have to get it go, they'll have it ready but we'll have to get it to go because they close at 11. So Danny and Willy went in to get the pizza and then they came back. I was still on the sofa and they wanted to watch some sports show that comes on, Sports Wrap Up or something so that was my cue they wanted me to leave the couch and go to bed, which I did.

Q. What time do you think that was?

A. Oh, probably 11:15, something like that.

Q. So who was there at that time?

[Page 130]

A. At the time I went to bed?

Q. Yeah.

A. Danny and Willy left in the house.

Q. Now, Mr. and Mrs. – Jenny and Clarence are Joel's parents, correct?

A. Yes. And they live in a bus that they made over into a (inaudible) that's parked in the back side of the parking lot.

* * * * *

[Page 130]

Q. Okay.

A. After that when I'd gone to bed Willy left after a while and – I'm not sure, I would think about midnight that Willy drove off (inaudible).

Q. So you didn't see him leave but you heard him leave, is that –

A. I heard him leave, yes.

Q. Did that wake you up or were you already awake?

A. I was probably just on – kind of in a semi state of sleep but I heard the vehicle start and (inaudible).

[Page 131]

Q. Okay. What do you remember after that?

A. After that then Randy came in and woke me up and he said he was really tired and he was going to sleep there and could I make sure and wake him up earlier because he would (inaudible) clothes and he had to go get his work clothes at Jill's and he had to leave earlier. Because before – he had told me before he'd gone to grandpa's that he was anticipating staying the night there and he wanted me to wake him up at 5:00 and then when he came in he (inaudible) and he said (inaudible) can you wake me up earlier. So I had to get up at (inaudible). I set two alarms. I had (inaudible) and my digital alarm and I set that for 4:30.

Q. What time do you think it was when he came in and woke you up?

A. Looking at the digital alarm 2:16 sticks in my mind. It was after 2:00 because I know after he's gone to bed (inaudible) just slept on the couch, Danny's dog started barking (inaudible) shoot that dog. And I told Randy to get up and put her outside and he said – he yelled at her, "Heidi shut up." (Inaudible). And she did, she shut up and that was about 2:30. I think I had dropped off to sleep in between the time I had set

the alarms and she started barking hard enough to wake me up (inaudible). And after that Danny yelled at Randy [Page 132] because his dog was just very special and he didn't want anybody yelling at her. (Inaudible).

Q. Do you know what he yelled back?

A. Don't yell at my dog, something to that effect. And then I woke Randy up. I yelled and yelled at him. My clock – the radio comes on ten minutes before the alarm so (inaudible). And I yelled at him to get up and he wouldn't answer so I had to get up and go out and he was on the sofa and I had to shake him awake and he was fully dressed and he got up and he went into the bathroom and then he got in his car and left.

Q. Which car did he have then?

A. A blue Volkswagen Jetta.

Q. Did you see him again that day?

A. I do not recollect seeing him again that day. It's possible. I can't say with any authority that he may have came by work. A lot of times when he's finished with his work at, when he worked in Bend, he'd come through, stop at the bakery and maybe he'd bring me flowers or something and he'd – I (inaudible). I didn't see him that night anyway. That was Monday morning that I woke him up. I am not sure if it was that Tuesday night or that Wednesday night, right in there, is when I first became aware that two people were murdered.

[Page 133]

Q. Now going back, you said that Danny and Willy left to go deer or elk scouting at about 1 p.m. and then Randy showed up after that?

A. Yes.

Q. About how long would you say it would have been after that?

A. I would say it was between 8 and 9:00. The sun was still up but it was going down. It was enough to light up the area where (inaudible). It was still up in the sky.

* * * * *

[Page 136]

Q. I think you said earlier that you don't remember whether you saw him after he left in the early morning hours on Monday.

A. I don't recollect. If he came by I do not recall. He might have but it doesn't stick in my mind for some reason.

Q. How about Tuesday the –

A. No, he called me. I believe that's the night he called me because from that time he stayed until he called me I didn't see him. Whether he called me Tuesday or Wednesday, he may recall if it was Tuesday – whatever night that somebody came and –

Q. And talked to him?

A. -- and talked to him that he called me after that and told me that this had happened. And I had not seen him from that time I woke him until – and I didn't see him [137] that day I believe it was a day or so that I saw him after that, after he called me.

* * * * *

[143]

Q. Now does your father-in-law and mother-in-law do they drive? Do they - -

A. Grandpa does. Grandma's not safe to drive. She let her license expired some time ago. She's go diabetes as well as Alzheimer's Disease.

Q. How old are Jenny and Clarence?

A. Grandpa just turned 77 and grandma will be 79 next month.

* * * * *

[Page 1145]

Q. Does Jenny – some people that have Alzheimer's have a hard time remembering things and that kind of thing.

A. Grandma – I envy her not knowing anything. If you ask her what the day is she doesn't know.

Q. I think we'll just avoid having her come in.

* * * * *

[151]

Q. Did Randy ever tell you that Mark had told him that Mark had shot a couple of guys or killed a couple of guys?

A. Jill – Jill – I was going to say that when you asked if I – or mentioned Ross Cathey. Sometime during that vacation I had been at her house and Jill said that Monday morning she didn't – she said that Mark and Ross said that they had blown – a drug deal went down, went [Page 152] bad, or something like that and they had to blow two people away and throw them over the cliff. I'm assuming they meant the gorge. I think they said the gorge.

Q. But that was related to you by Jill, correct?

A. This is what Jill –

Q. Did Randy himself ever tell you any story like that?

A. No. She told me that Ross had told her something about a trick he learned in the Marines I think about sticking a knife in somebody's throat and twisting it. He would demonstrate it how he did this, just, this is the way Jill said and

that's the only thing that I think she said about Ross. But I've never Ross. To see the picture I haven't –

* * * * *

[Page 153]

Q. The green shed out there adjacent to your property?

A. Yes.

Q. The police located some items that were identified as property from the Housers?

A. That's what they told me.

Q. Do you have any idea how it got there? Not that we're saying you did anything.

A. Oh, absolutely none. That shed had been empty and he had – Joel knows my comings and goings. I'd go to work and I'd come home, that's all I did. If he came up there very rarely was I there. I never saw any activities of anything being brought in or anything.

Q. So it could have been when you weren't there?

A. It had to have been because if he's there I know it. I'm alert to that because even though I've had the restraining order I haven't followed to hard – well, I did it – I filed the restraining order in the hopes that Joel would see what he was doing to our family and that he'd realize he was going to miss us, you know. I [Page 154] guess he doesn't love us.

* * * * *

[Page 154]

MRS. GUZEK: If he was there while I was there I knew it and I did not see him around the buildings or anything. And he had locks, they were – he put – I found out, I didn't know

until the police came – triple locks (inaudible). Three big locks on it. What he had in there I have no idea.

* * * * *

Q. How about the night that the murders occurred. Do you have anything written down that night?

A. No.

MR. BROWN: Questions?

Thank you, Mrs. Guzek, I know it's been tough.

(Witness excused.)

* * * * *

CLARENCE GUZEK EXAMINATION

* * * * *

[Page 157]

A. Well, I've been here since about '78.

* * * * *

Q. And you're obviously retired, sir?

A. Oh, yes.

Q. And what type of work did you do?

A. Operating engineer.

Q. Are you feeling okay now?

A. A little dizzy.

* * * * *

Q. That's pretty fast all right.

Okay. I wanted to ask you some questions. You live out there with Kathleen on her –

A. I live in my own motor home.

Q. Right, okay.

A. But on the same land.

[Page 158]

A. -- yeah.

* * * * *

A. Sometimes soon, right.

Q. I want to ask you about – how did you hear about first that the Housers had been murdered? Did you read it in the paper or –

A. No, I heard it on TV.

Q. Okay. Now do you remember the weekend before you heard about he Housers' murders? The weekend that occurred before that?

A. That would be what date?

Q. Well, I think it came out on TV around the 1st of July [Page 159] so we're talking about the 27th or 28th of June.

A. The 28th don't ring no bell at all – or the 27th. The 28th it does because Randy wanted to buy the motor home and it was at that time that, that evening on the 28th that he come up and asked if I was willing to sell the motor home for $7,000.

Q. That's the Itasca we mentioned?

A. Itasca, yeah. So I said well, to you I would let you have it for that money, $7,000, but only to you. Cause he helped me out last spring. He the one that actually saved my life getting me into the hospital and getting me to Portland and stuff like that and I'd helped all the kids up to a point. I owned a fifth wheel that I bought here in town from the trailer sales on the end of town – Boys – Boys.

A JUROR: Country Boys?

MR. GUZEK: What's that?

A JUROR: Country Boys?

MR. GUZEK: Country Boys, yeah.

* * * * *

[Page 160]

Q. So Randy came and wanted to buy the motor home?

A. And he asked if he could – if I would take $3,000 down and I said yes, and that's what I did.

Q. He paid you 3,000 in cash?

A. Yes.

* * * * *

[Page 161]

Q. So how did he pay it to you? Did he pay you cash or –

A. He paid me cash, yeah. He paid me cash. Counted it out there on the davenport.

Q. Small bills or hundred dollar bills?

A. Hundred dollars bills.

Q. Do you recall what time of day it was that he –

A. Oh, yeah, it was between 8:30 and 9. It was still daylight.

Q. Was he with anyone else?

A. No, he was alone.

Q. And did that happen out at your place in the –

A. Right in my motor car.

Q. Okay. What else happened when he came over?

[Page 162]

A. Nothing happened.

Q. I mean did you talk about other things or –

A. Yeah, we talked quite late that night. It was, I know, between 1 and 2 when he went home. Because he went over to – stayed over at his mother's place.

Q. Did you see him walk over there or –

A. No, it was too dark to – when he left.

(Tape 3, side 2).

Q. It seems like an awful late hour for –

A. For them kids?

Q. No, not for them kids for –

A. It was for me because –

Q. -- for you.

A. -- I was, well I was nursing a sore side for one thing. I couldn't lay down and it was easier for me to sit up than to lay down. The bypass was giving me trouble.

Q. What all did you talk about? That's a lot of –

A. Oh, my God, we talked about everything. We talked mostly about the motor home I guess and his ambitions, what he wanted to do and so on. I asked him if he's like to join the Army or the Navy and that didn't set to good.

Q. Now, when he paid you the money did you give him the title to the deal?

A. Oh, no. Oh, no.

* * * * *

[Page 163]

Q. I see. Did you know that Randy had to go to work the next morning?

A. I didn't know but he knew it because he told me along about midnight. He said, dad I've got to get home and he says I've got to work tomorrow night or – to, I've got to go to work today he says. So I says, if you're gonna go home you'd better go home because I'm not going to go to bed. I'm going to sit here on the davenport because if I lay down I'm in pain. If I sit up I'm okay. Well, one thing led to another but he didn't leave then until about – it was after 1:00. Around 1:30 or a quarter to 2; something like that.

Q. So what did you do after he left?

A. I sat there on the davenport.

Q. Until what hour would you say?

A. The next morning. Well, I'm an early riser but that [Page 164] morning I slept until about 8:00 when I woke up.

Q. What time do you think you went to sleep?

A. Well, I woke up twice during the night after he left. Once I had to go to the toilet and I looked out the window and it was about 4:00 then and his car was still there because it was parked right between my camper and the Itasca and the big flood light shined right down on it. And you could hear that – you could hear that diesel start. It sounded like a bunch of bolts in an empty pain.

Q. So what time do you think you fell asleep and then woke up again?

A. Well, I was probably asleep by 2:30.

Q. And then you woke up around 4 you say?

A. I had to – yes, I had to go urinate and when I did why his car – I looked out the window and his car was in the same place that he had left it that night.

Q. And then what happened after that?

A. I went back and sat down on the davenport.

Q. And did you go back to sleep again?

A. Yeah.

Q. What's the next thing you remember after that?

A. Hearing that car start up.

Q. And what time do you think that was?

A. It was about 5:30. I didn't look at the clock but I just surmise it was around 5:30.

* * * * *

[Page 168]

Q. Did you and Randy have anything – I think you already [Page 169] said something about this. It was just a verbal agreement regarding the motor home?

A. That's right. Her asked if I wanted a contact and I said, no, Randy, if your work is no good now it wouldn't be any better on a contract. I never had a contract on the fifth wheel with Jill. I never ask contracts with the family.

Q. I just wondered if there was anything in writing at all.

A. Well, the only thing I done that I marked on the envelope that I put the money in because I know my memory. And I put the date, the amount that Randy gave me and I think I put on it motor home was not to leave the premises until paid for. And that was the agreement we had with Randy. He agreed not to take it out on the road or use it until it was paid for.

* * * * *

Q. I see. What happened to the envelope that the money was in?

A. The investigator for –

Q. Mr. Chastine (phonetic)?

A. I think that's his name. Took the envelope and the money was still in it when he slit the envelope open and gave me the money and said, I will send you a copy, a photocopy of the letter, but he never did.

Q. Huh. That's Randy attorney's investigator that has it?

A. Yes.

Q. As far as you know?

A. As far as I know.

Q. Okay.

* * * * *

[Page 173]

Q. So it sounds like Randy was with you for five or six hours on Sunday? Four or five hours?

A. Four or five hours I'd say.

Q. Okay. And was anybody – you don't remember whether you say Danny that night or –

[Page 174]

A. Danny?

Q. Yeah, Danny, the night Randy was there. Or do you remember?

A. No, but Danny did come in. There was two pickups come in about 11:00 and one of them went back out and I

asked Randy then, I said, Randy, how come Danny's going back out on the highway? And he got up and looked out the window and he says, well that's not Danny's truck, he says it's Willy's truck, Danny's friend. And they were – he says Willy's going home. So then about 20 minutes later the truck pulled in again. What they'd done Willy and Danny had went down and got hamburgers and I guess they brought them back home but, you know, I didn't see him personally.

Q. Now what time was that again, sir, that you thought that was?

A. About 11:00.

Q. Okay.

A. It was the same night that Randy was sitting in the trailer or the camper with me, talking.

* * * * *

[Page 175]

Q. Do you wear a watch, Mr. Guzek? I thought I saw one there. A big one.

A. I can see it.

MR. BROWN: I think that's all the questions we have for you.

MR. GUZEK: All right.

MR. BROWN: Thank you for coming in, sir.

MR. GUZEK: Well, thank you. Thank you.

(Witness excused.)

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF DESCHUTES

STATE OF OREGON, Case No. 87CR0373TM

Plaintiff,

v.

RANDY LEE GUZEK,

Defendant.

Guilt Phase

March 22, 1988

[Page 111]

Bailiff, raise your right hand and be sworn, please?

C LARENCE GUZEK

Called as a witness, having been first duly sworn, was examined and testified as follows:

THE COURT: Be seated right up here, please.

State your full name, spell your last name?

A. Clarence Guzek.

THE COURT: Go ahead.

DIRECT EXAMINATION

BY MR. KITTREDGE:

Q. Mr. Guzek, can you hear me all right?

A. Yeah. Okay.

Q. Okay.

THE COURT: Can you get a little closer to that microphone, Mr. Guzek? That will help you, point it right at you, thank you.

MR. KITTREDGE: You are still hearing me okay?

A. Yeah.

Q. Where do you live, Mr. Guzek?

A. I'm living at the Mountain View Trailer Court on South Highway 97, Redmond.

Q. Uh-huh. How long have you lived there?

A. About five months.

Q. Where did you live previous to that?

A. At 624 NE Walnut.

[Page 112]

Q. Okay. And how long did you live there?

A. We lived there about ten years.

Q. Okay. So were you living there in June of 1987?

A. Yes.

Q. Okay. Do you happen to know Randy Guzek?

A. He's my grandson.

Q. Okay. You know him pretty well then?

A. Right.

Q. Okay. Did you have occasion to see Randy Guzek in late June last year, 1987?

A. Late June?

Q. Yes, sir.

A. Yes.

Q. Okay.

A. Do you recall when that was?

A. What date?

Q. Well, do you recall what date?

A. Yes, it was the 28th.

Q. 28th? Okay. And about what time?

A. Well, he come in about, it was just, I'd say around nine o'clock that evening.

Q. Uh-huh. Had you seen Randy Guzek recently? I mean last, this day we are talking about, had you, do you, were you seeing him every day?

[Page 113]

A. I hadn't seen him for, on, two weeks or a month. Almost a month prior to that.

Q. Okay.

A. Now the address on Walnut Street you gave me, does anybody else live at that address?

A. My daughter-in-law.

Q. Okay. Now, does she, where does she live on that property?

A. Well, she lives in the main, in the main residence.

Q. Okay. Is this a mobile home?

A. Yeah. Yes.

Q. Where were you living on the property at that time?

A. Well, I have a diesel motor home.

Q. Uh-huh. And you were living in that?

A. Right.

Q. Okay. Now, Randy comes to visit you on the 28th of June; is that correct?

A. That is right.

Q. Does he give you any reason why he comes to visit you after two weeks to a month?

A. Well, last time, prior to that, that he was over, he asked if I would consider selling him the motor home. I have an Itasca motor home and it's sitting there [Page 114] idle, so I told him that he could, we could negotiate a deal on it.

So, he asked me how much I'd take for it. Well, I said, "Well, to you I'd take seven thousand dollars. How do you want to pay for it?" Well, he says, "I'd like to have it."

Q. Okay. Where, where was the Itasca motor home at?

A. It was parked about, about 30, 35 feet from my diesel.

Q. Okay. Where was it parked in relation to the main mobile home that's on the property?

A. To the main?

Q. Yeah.

A. Between, between my diesel bus and the main residence.

Q. Okay. Is it still there?

A. Still in the same position, same place.

Q. Now, did Randy bring up this motor home when he came to visit on, on the 28th?

A. Did he what?

Q. Did he bring up the motor home when he came to visit you on the 28th?

A. If, he asked if I wanted to continue, would make the deal then.

[Page 115]

Q. Okay. What did you tell him?

A. Told him yes, if he wanted to. Why, he says, "could I put three thousand dollars down on it."

Q. Did you agree to that?

A. I did.

Q. Okay. Then what happened?

A. Well, then he said "wait a minute, I will go over to the house and get the money." And about five or six, seven minutes, he was back and counted out the money.

Q. Okay. So he gave you three thousand dollars?

A. Yes.

Q. Was that in cash?

A. That was in cash.

Q. Okay. What did you do with the money?

A. Well, I counted it and I put it back in the envelope, laid it over on the table.

Q. Okay. It was in an envelope?

A. What's that?

Q. Was it already in an envelope or did you put it in an envelope?

A. No, he had it in an envelope.

[Page 116]

Q. And you laid the envelope aside; is that correct?

A. I?

Q. You laid the envelope aside at that time?

A. Yes.

Q. Okay. Then what happened?

A. Well, we just sat there and talked until almost midnight.

Q. What did you talk about?

A. Oh, traveling, education, his schooling and so on. Trips that I'd made with the motor home.

Q. Uh-huh.

A. And then what happens?

A. Well, then, the way I was sitting, there was a, there was a flash of headlights come across the bus, and I asked Randy. I said, you know, "who's going out, looked like somebody's gone out of here."

Well, he says, "I think it's Danny and Willie going out to get a pizza," get something to eat or something to that effect. There's no more said about it. That was about, I'd say around 11 o'clock.

Q. Didn't you say it was midnight before?

A. No.

Q. Oh?

A. Not midnight, no. It was --

Q. It's 11 o'clock?

A. About 11 o'clock.

Q. Okay. Now what happens after you see the [Page 117] headlights and that goes on?

A. Well, we just continued talking, and until again the headlights shown up and the car come back in. Well, I figured that was just, told Danny or Randy, I think that's Willie and Danny coming back from, must have had their pizza.

Q. Uh-huh.

A. Outside of that, well, there's nothing happened until he asked what time it was. And I looked up on the wall on the far end of the bus, and I got an electric clock. And he said, "it's, my god, it's almost 2 o'clock. I have got to get home and get some sleep."

Q. Uh-huh.

A. So --

Q. So what did he do at that point?

A. He jumped up and went home.

Q. Okay. Did you see him any time after that, during that night?

A. That night?

Q. After he left, yes.

A. No.

Q. After he left, what did you do?

A. Well I, I sat there for awhile, and got, thought about making up this -- I did ask him if he wanted a receipt earlier in the evening and he says, "well, I'd [Page 118] like to have one."

I said, "fine, will tomorrow be all right?" He said sure. So I took, took the envelope, and it was pretty well battered up, so I put it in another envelope like it. And I put it back there on the table again, and got to thinking well, I might as well do it now, I can't sleep anyhow.

So I wrote out the receipt the way it says on the envelope, the date.

Q. Is there some reason you don't sleep well?

A. Well, yes. I'd five bypasses in January, and I have a, what do you call them, angina.

Q. Okay. That was January of '87 that you had the by-passes.

A. Yes. Yes.

Q. So that would have been several months prior to this incident; is that correct?

A. Had them in January 20th.

MR. KITTREDGE: Approach the witness, Your Honor?

THE COURT: Yes, you may.

MR. KITTREDGE: Q. Mr. Guzek, I'm going to show you what's been marked Defendant's Exhibit 303 and ask you if you can recognize what that is?

A. That is my writing and that is the envelope I [Page 119] put it in.

Q. Okay.

A. Now, I want to call your attention to some initials and a date up in the right hand corner and ask you if that's your writing and your initials or your writing?

A. Here?

Q. Yes, sir. Do you remember it? If you don't remember it, it's all right.

A. I don't remember writing that in there.

Q. Okay. Oh, I'd like you to look at it one more time. Call your attention that the top is slit. Is that the way the envelope was?

A. No.

Q. When you wrote it?

A. No.

Q. Do you know how it happened to get opened?

A. LeRoy Chastain.

Q. He did it?

A. Yes. The envelope was not opened when I handed it to LeRoy.

Q. You handed the envelope to LeRoy?

A. Yes.

Q. It wasn't open?

A. No.

[Page 120]

Q. Money was in it?

A. Money was in it.

Q. Okay. And he slit the envelope open?

A. Yes.

Q. What happened to the money?

A. I don't remember whether he counted it or not. I think he did. He put it back in the envelope, handed it back to me.

Q. Uh-huh.

A. Up here, I can't recognize this.

Q. Okay. That's where it says, looks like LEC or something, 8/6/7/'87. That's the part you don't recognize?

A. Yes, words.

Q. Right here?

A. Up above the --

Q. Yeah, that's what I'm saying.

A. Yeah.

Q. The dark printing?

A. Right.

Q. When's the last time you saw this envelope, Mr. Guzek?

A. When I gave it to my daughter-in-law.

Q. You gave it to your daughter-in-law?

A. Yes.

[Page 121]

Q. I thought that you gave it to Mr. Chastain?

A. He gave it back to me.

Q. And you gave it to your daughter-in-law?

A. Yes.

MR. KITTREDGE: Okay. No more questions.

CROSS EXAMINATION

BY MR. BROWN:

Q. Mr. Guzek, I have some questions for you, sir. It's your recollection that you gave that envelope to your daughter-in-law, Katherine Guzek?

A. Yes.

Q. You remember when that would have been approximately, sir?

A. Not, not date-wise.

Q. Did she ever give you the envelope back after you gave it to her?

A. I don't remember if she did or not. I don't think she did.

Q. Sir, you are now living in a trailer park by the Brand Restaurant; is that correct?

A. Yes.

Q. When did you move to that location?

A. I think I have paid five months rent on it already. Be about five months ago.

Q. About five months ago? What did you say your [Page 122] street address was there on Walnut?

A. 6 -- 2678. I said my Post Office box number.

Q. Oh. Oh. I don't mean to embarrass you, sir, but would you tell us how old you are?

A. I'm, I will be 78 in October.

Q. Do you have to take any type of medication?

A. Yes.

Q. What type of medication do you have to take, sir?

A. For my heart. It's a blood thinner and Inderol, and aspirin.

Q. I heard the blood thinner. What was the other two you said you took?

A. Inderol for the, for the heart blowup from when I had the heart attack. In fact I had two heart attacks, one in Provo, Utah, and one in last January, but, Provo, Utah, and one in last, what we thought was a blow out in the heart structure itself. And, this Inderol is to deal with the heart.

Q. And that occurred when you had the heart attack last January?

A. I don't know, I don't think so. I had the pain in there nine years ago when, or thereabouts when I was in Provo, Utah, were up there visiting my wife's sister.

And, I had to go to the hospital and, hit me in [Page 123 the morning, first it hit me in Wednesday in a rest area in Nevada. I survived that one, and we, next morning it was like nothing happened. I continued on into Salt Lake and then on over to Provo. We stayed there then until Saturday morning at my brother-in-law's motel.

And, that morning it hit me again. That time I went to the hospital for eleven days. And the doctor there, Dr. Bridges, he said you probably have a heart damage, but he says, at this time, he says, we are, we are going to release you if you stay, try to stay within the program that I set for you, which I did until January the 20th of last year.

Q. Have you been on that medication you talked about since your heart attack last year?

A. Yes.

Q. Are you retired, sir?

A. Yes.

Q. How long have you been retired?

A. About about ten years.

Q. You have to take care of your wife, do you not, sir?

A. Yes.

Q. She has an illness?

A. She has Alzheimer's or whatever you call it.

Q. Alzheimer's?

[Page 124]

A. Alzheimer's, and she's also diabetic.

Q. That pretty much a full time job, I imagine?

A. You could say that again.

Q. Do you remember when Mr. Kittredge, the defense attorney over here, was asking you questions just a minute ago? Do you remember something about saying that you talked to your grandson on June 28th up until midnight?

A. It was after midnight.

Q. You remember saying anything about midnight just a few minutes ago?

A. I thought that is when about that time when that the kids come in after having pizza.

Q. Well, was it midnight or was it 11, do you remember?

A. They left around 11. I'm not sure of, I can't recall the exact time because I, it didn't mean nothing to me.

Q. Right. Do you remember a police officer by the name of Lynn Fredrickson?

A. Yes.

Q. Have you spoken with him on a number of occasions?

A. Have I what?

Q. Have you spoken with Mr. Fredrickson on several occasions?

[Page 125]

A. He was up to the place on, yes.

Q. Do you remember talking to him about the first week of January of this year? January the 8th to be exact?

A. January the 8th?

Q. That's correct. He was with another officer named Little?

A. I can't recall the date.

Q. Okay. Let me just ask you if you told him that you have a difficult time remember dates and times?

A. I did have, up until my operation.

Q. Did you tell him that you still have a difficult time remembering dates and times?

A. At times, yes.

Q Do you remember telling Officer Frederickson on that date that you couldn't remember when you wrote the date on the envelope that Mr. Kittredge just showed you?

A. I don't think so.

Q. Do you remember speaking with Officer Fredrickson about a little over two weeks after the first time I just mentioned on January 8th, talking to him again on January 26th, 1988?

A. Again the date don't mean nothing.

Q. Okay. He was with another officer that day, another State Police officer named Crawford. Does that do [Page 126] anything for you?

A. Yeah.

Q. Do you remember asking Officer Fredrickson on January 26th, if you and he had ever discussed the matter of that envelope prior to that date?

A. If he and I?

Q. Yes. Do you remember asking Officer Fredrickson "did you and I talk about the envelope sometime before"? Do you remember asking the officer that question?

A. (witness shakes head) No way.

Q. Do you remember telling him again that day on January 26th that you really were not sure when you wrote the date on that envelope?

A. No way.

Q. Do you remember telling him on that day that you couldn't remember whether it was the Defendant, your grandson, who had told you what date to write on the envelope?

A. Say again?

Q. Sure. You remember telling Officer Fredrickson that same day, January 26th, that you could not remember whether your grandson had told you what day to write, date to write on the envelope?

A. That's not true.

[Page 127]

Q. Do you remember telling Mr. Chastain that you've had a bad memory?

A. There's at times I do have a bad memory.

Q. Okay. So you probably told him that?

A. It's possible, but in the, in the gist of the conversation, if I had to recall a certain event at a certain time, I'm same as anybody else, can't do it.

Q. If, do you remember telling Mr. Chastain that Monday morning, after your grandson came over to talk to you about the motor home, that you saw your daughter-in-law, Katherine, going to work?

A. On what, on what morning?

Q. The Monday morning, part of the same day that you claim that you saw your grandson, would be Monday, June 29th, 1987?

You remember telling Mr. Chastain that you remember seeing your daughter-in-law, Katherine, leave for work early that morning about 6, 6:30 a.m.?

A. I don't remember anything, recall talking about Kathleen at all.

Q. Now, Mr. Guzek, after your grandson left your motor car early that morning, about 2 a.m., I believe you said, did you go to bed?

A. No.

Q. What did you do?

[Page 128]

A. I sat up on the corner, the end of the davenport for maybe half an hour, because that's the only way I could get to sleep. If I laid down, I'd plug up and I, my heart hurt so bad I'd have to get up anyhow.

And, I finally got up, and I, aw, might as well make out the receipt now, so I turned on the table light so, I got the envelope and I marked the time and the date, not the time but the date, and what is on the envelope.

Q. So did you eventually go to bed sometime that morning?

A. No. No.

Q. Do you recall the date that the police came out to the residence out there on Walnut Street and searched it?

A. (witness shakes head) I have no idea of the dates at all.

Q. Did you ever hear about the fact of Mr. and Mrs. Houser being murdered?

A. I, the, name-wise I didn't, I don't think I heard the name, but just that two people had been murdered.

Q. Do you recall when you heard it, when you found out about it?

A. I think it came on the t.v.

Q. Do you remember when the date was when you [Page 129] heard about it?

You indicated that you and your grandson had been talking over some period of time about him making some kind of offer to you to buy the motor home? Is that correct, it occurred over a period of time?

A. Once or twice possibly he might have said that he'd like to have it, would I consider, you know, letting him buy it.

Q. Do you recall when he first started talking to you about buying the motor home?

A. In relation to?

Q. In relation to when you testified he paid you the three thousand dollars.

A. No, I don't, I don't remember.

Q. Did you ever see the Defendant leave the Walnut Street address later that morning after he had left your presence and go somewhere else to go to sleep?

A. You mean Randy?

Q. Yes.

A. Did I see him after that?

Q. Correct.

A. Not that night.

Q. When did you next see him after that particular night, do you recall?

A. It was a couple of days later, Tuesday or a [Page 130] Wednesday, I'm not sure, and he came over and went into the motor home.

I unlocked it for him. He brought, he'd brought something out from the house, I don't know what it was. And I, when he come back in the bus, why, I asked if he wanted to go up to the, Bob's and have a hamburger, which he did.

And Grandma and myself and Randy went on up to the Bob's and had a hamburger.

Q. Mr. Guzek, do you recall testifying before the Deschutes County grand jury back last October?

A. Yeah.

Q. I believe the date was October 23rd, 1987.

A. Could have been, I don't know.

Q. Do you recall at that time -- Counsel, if you have a transcript, it's page 166, line 17. Do you recall at that time telling the grand jury that you did not see your grandson, Randy, anymore after that date at the motor home with the three thousand dollars up until the time he got arrested?

A. No, I don't recall saying that. But, it's very possible that I did. Because at that time, I probably didn't recall, because, there was a few days there I I did have bad recall.

Q. When was the last time you saw your grandson [Page 131] before this particular occasion with the three thousand dollars and the motor home?

A. The next?

Q. The last time before that, that you saw him?

A. Before that?

Q. Yes, sir.

A. It's quite awhile. Couple weeks or maybe a month.

Q. Now, sir, being retired and having a full time job of caring for your wife, one day basically is kind of like the next, isn't it?

A. Like what?

Q. One day is kind of like every other one?

A. They have a tendency to, yes, to blur into each other.

Q. Unlike as if you had, when you were working, when you were employed and you had work, oh, so many days, then you had the weekends off or whatever.

Sir, again going back to what you said to the grand jury, page 177 on line 11, do you recall telling the Deschutes County grand jury that you thought you had put the date, the amount that Randy Guzek had given you, and the fact that you had put on it that the motor home was not to leave the premises until it was paid for?

[Page 132]

A. That is right.

Q. Do you recall what you did on Sunday, June 28th, before your grandson showed up?

A. Yes. I was in the bus all day.

Q. Do you recall telling the grand jury that you either went to Smith Rock that day, or to the lake, Haystack Reservoir?

A. I don't remember saying that.

Q. Do you recall what you did the day before that on June 27th?

A. It's very possible that we did go to Smith Rock on that day. That would have been, that would have been on Saturday?

Q. Yes, sir.

A. I know we made, we made a run out to Smith Rock on one, but not on Sunday, because Sunday I had a bad day.

Q. You had a what?

A. I had a bad day, my heart was hurting.

Q. Do you remember telling the grand jury that you don't remember what you did on Saturday, June 27th?

A. I may have. I don't know.

Q. Okay.

MR. BROWN: Thank you, sir, no further questions.

REDIRECT EXAMINATION

[Page 133]

BY MR. KITTREDGE:

Q. Mr. Guzek? Can you hear me, sir, can you hear me now?

A. Go ahead.

Q. Okay. Do you normally date your business receipts?

A. To which?

Q. Do you normally date your business receipts? Well, let me ask, go ahead.

A. In, I don't have any business.

Q. Well, okay. Did you date the receipt that you gave, that you wrote out to give to Randy?

A. I, if I, yes, I think so.

Q. Okay.

A. Wouldn't be a receipt if it didn't have a date on it.

MR. KITTREDGE: Uh-huh. Approach the witness, Your Honor?

Q. Is there a date on that receipt, Mr. Guzek?

A. 6/28.

Q. Okay.

A. From Randy Guzek.

Q. Now, Mr. Guzek, the events you've testified about, Randy coming over and giving you three thousand dollars down payment on the motor home, happened on [Page 134] the day that you dated this envelope; isn't that right?

A. That's right.

Q. Now the Prosecutor asked you about some of your testimony in October, about what you did during these times. Would you say your memory was better in October about what you did in, in June than it was now some several months later?

A. I just can't unravel that.

Q. Okay. Well, why don't we just forget that. Now you stated that you gave this envelope to your daughter-in-law; correct?

A. Right.

Q. And isn't that correct that then she gave it back to you and you gave it to Mr. Chastain?

MR. BROWN: Objection, all these leading questions, Your Honor. He's already been asked and answered it on Cross.

THE COURT: Rephrase the question, it was leading.

MR. KITTREDGE: Q. You stated that you gave this envelope to your daughter-in-law; correct?

A. Yes.

Q. And didn't she give it back to you?

MR. BROWN: Same objection Your Honor, leading.

THE COURT: It's leading, rephrase it.

[Page 135]

MR. KITTREDGE: Q. Did she give it back to you?

A. Yes.

Q. Did you give it to Leroy Chastain?

A. I, yes.

MR. KITTREDGE: Okay, no more questions.

RECROSS EXAMINATION

BY MR. BROWN:

Q. Mr. Guzek, didn't you just tell me she never gave it back to you?

A. I don't know if I did or not, I don't think so

MR. BROWN: Okay, no further questions.

MR. KITTREDGE: No more.

THE COURT: Thank you, Mr. Guzek, you can step down.

MR. KITTREDGE: Defense calls Leroy Chastain.

LEROY CHASTAIN

Called as a witness, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KITTREDGE:

Q. Would you state your name, spell your last name for the record, please?

A. Leroy Chastain, C-h-a-s-t-a-i-n.

MR. KITTREDGE: Approach the witness, Your Honor?

[Page 136]

THE COURT: Yes.

MR. KITTREDGE: Q. Mr. Chastain, I'm handing you now what's Defendant's Exhibit 303. Before I ask you about that, I have got a couple of questions, other questions.

Where do you live, Mr. Chastain?

A. In Bend.

Q. How are you employed?

A. I'm a private investigator.

Q. Were you employed as a private investigator in this matter?

A. Yes, I was, sir.

Q. As a result of your employment, did you talk to Clarence Guzek?

A. I did.

Q. At any time during that conversation were you given Defendant's Exhibit 303?

A. I was.

Q. And, what did you do with it?

A. After securing it, I placed my initials, I dated it, the date on it is 8/6/87.

Q. Where did you date it?

A. It's in the upper right hand corner.

Q. Is there some difference between the ink you used and the ink the other thing that is written on the [Page 137] envelope?

A. Ink that is written on it prior to my initial is a grayish blue. Mine is written in black.

Q. Who did you get the envelope from?

A. I obtained this from Clarence Guzek.

Q. What have you done with it since that time?

A. Since until today?

Q. Have you had it with -- let me withdraw. Have you had it in your possession until today?

A. The envelope has been in my possession up until today when I gave it to you.

MR. KITTREDGE: Okay. We'd offer Defendant's Exhibit 303.

MR. BROWN: It's hearsay, Your Honor, object.

THE COURT: I beg your pardon?

MR. BROWN: I'm objecting to it on the basis of hearsay.

THE COURT: Do you have an exception to the hearsay rule you think applies is not a court statement?

MR. KITTREDGE: Your Honor, I guess we would say really it's not hearsay in it's not being offered for the truth of the matter asserted. It's being offered because Mr. Guzek states that he made this envelope on that night, and that's what he did.

And he also testifies that he wrote it, and [Page 138] this is to prove that he did write it.

THE COURT: I'm going to overrule the basis, on the basis it's past recollection recorded.

MR. BROWN: Your Honor, I believe that particular exception indicates that if The Court allows in the exhibit, it's supposed to be read to the jury rather than accepted as a exhibit.

I would simply ask that it be read rather than fully received.

THE COURT: Oh. Do you have anything, other exceptions? You are saying this is not hearsay, aren't you?

MR. KITTREDGE: Well, I guess we would.

THE COURT: I --

MR. KITTREDGE: In other words, you know --

THE COURT: Just a minute. You have any other exception to the hearsay rule that applies?

MR. KITTREDGE: No, Your Honor.

THE COURT: What was your theory that it's not hearsay?

MR. KITTREDGE: Well, he stated that --

THE COURT: Just tell me why you think it's not hearsay. Briefly, very briefly.

If you want to argue it --

MR. KITTREDGE: It's not being offered for the [Page 139] truth of the matter asserted. It's being offered to prove that he wrote it, when he said he wrote it.

THE COURT: Well, all right. I'm -- Mr. Brown's correct. The rule requires under past recollection recorded that the document can be read into the evidence, but not received as a exhibit.

Unless it, it's been offered by an adverse party, seems to me it's obviously being offered for the truth of the matter asserted that he received the money on that date.

So, I will allow the document to be, contents to be read to the jury.

MR. KITTREDGE: Okay.

THE COURT: But I will sustain the objection as reception in evidence to be given to the jury.

MR. KITTREDGE: The document reads as follows: "Down payment on motor home on 6 dash 28, from Randy Guzek, three thousand dollars, balance four thousand dollars, motor, oh, excuse me – balance four thousand dollars. Motor home is not to be taken off the premises until pay in full."

And then it's written Clarence Guzek, which looks like a signature.

THE COURT: Go ahead.

MR. KITTREDGE: Oh. That's all, that's it.

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THE COURT: Yeah, I understand that.

MR. KITTREDGE: We'd have no questions for Mr. Chastain.

CROSS EXAMINATION

BY MR. BROWN:

Q. Mr. Chastain, did Clarence Guzek ever tell you that he had given the envelope back to Kathleen Guzek?

MR. KITTREDGE: Objection, that's beyond the scope. That the --

THE COURT: Sustain.

MR. BROWN: No questions.

THE COURT: You may step down. Would you folks use the jury room for just a few minutes? I, well, let's take about a 15 minute recess at this point.

(jury is excused)

THE COURT: I, just a moment, we are not in recess. Let's talk about this ruling on that a little more. I'm not sure I got at exactly what you were trying to put forth, that this was not hearsay because it was being offered for the truth of the matter.

I didn't want to explain it very much in front of the jury. It, let me see if, if this is what you were saying to me.

MR. KITTREDGE: Well, I guess --

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THE COURT: The fact that you are seeking to prove to us that Randy Guzek was there?

MR. KITTREDGE: Yes.

THE COURT: At the time that evening?

MR. KITTREDGE: Right.

THE COURT: The witness testifies he remembers him there, being there, because they went through --

MR. KITTREDGE: The thing with the motor home.

THE COURT: This thing with the motor home, and that after Randy left, he made a notation with the day and what they talked about.

MR. KITTREDGE: Right.

THE COURT: But you are not seeking to prove the truth of the negotiation about the motor home?

MR. KITTREDGE: Right.

THE COURT: You are seeking to prove that Randy Guzek was there.

MR. KITTREDGE: Yeah. And I am not seeking --

THE COURT: No, this is not being offered for the truth of the negotiation about --

MR. KITTREDGE: Right.

THE COURT: But just to show --

MR. KITTREDGE: Substantiate --

THE COURT: What he says he did, he did.

MR. KITTREDGE: Right.

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THE COURT: You want to comment on that? I think maybe it's not being offered for the truth of the content of the writing.

MR. BROWN: Seems as, to me they are offering it to pro[illegible] that what Clarence Guzek said was true. And, that of course ties --

THE COURT: Yes, because he said he made notation about the negotiations, there's the notation.

MR. BROWN: And they are offering that to prove the truth, that Randy Guzek was there June 28th.

THE COURT: Yeah, they were seeking to prove he was there on June 28th. That is right. They are not seeking to prove that they agreed on the motor home.

MR. BROWN: But they are seeking to prove the theory he was there on June 28th by virtue of that date being on there.

THE COURT: Yeah, maybe you are right. You want to say anything further about that?

MR. KITTREDGE: Yeah, I guess that again would be our argument, that this witness testified that "on the 28th I wrote this document."

THE COURT: Well, wasn't he really saying that "I knew it was the 28th" because that's the date he wrote it?

MR. KITTREDGE: I don't think he quite said [Page 143] that. In other words, I asked him the first time --

THE COURT: Well, he said that specifically in answer to one of your questions.

MR. KITTREDGE: Well, I suppose that's, I did ask him that way also, I agree, but I also asked him, when I first started to question him, when it was and he said the 28th when he said him.

Well, I agree. I mean, I may be replowing that ground in my questions, but his original statement was that he saw Randy on the 28th.

THE COURT: Well, he testified to that before he even looked at the envelope.

MR. KITTREDGE: Yeah. And then in fact, the Prosecutor brought up the fact --

THE COURT: See, the ruling hinges on what you are trying to prove with it.

You are trying to prove that Mr. Guzek was there on the 28th. He testifies he was there on the 28th, that he made a note, that he put the date he was there, the note says the 28th. The note is then being offered to prove that he was there on the 28th, I think, as additional proof that he was there on the 28th. If –

MR. KITTREDGE: I suppose –

THE COURT: I'm going to leave my ruling stand. I don't think we can analyze out of that. Okay, we'll be in [Page 144] recess for about another ten, fifteen minutes. Call Kathleen Guzek.

KATHERINE GUZEK

Called as a witness, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KITTREDGE:

Q. Would you state your name and spell your last name for the record please?

A. Katherine Guzek. G-u-z-e-k.

Q. Where do you live, Mrs. Guzek?

A. 2678 NE Walnut in Redmond, Oregon.

Q. Where are you employed?

A. Safeway.

Q. Do you know Randy Guzek?

A. Yes, he's my son.

Q. Did you see Randy Guzek on or about June 28th, 1987?

A. Pardon me?

Q. Did you see Randy Guzek on June 28th, 1987?

A. June 28th, is that Sunday? If that was Sunday, yes, I did.

Q. Okay. Did you see him on a Sunday, the Sunday before the 4th of July?

A. Yes.

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Q. How is it that you would know that it was a Sunday?

A. That was my day off. I was off Sunday and Monday. And he came up that day, we burned weeds. He came up and I was laying on the couch, and he came and sat on the coffee table, wanted me to go over to Grandpa's with him.

Q. Okay. That's the first time you have seen him on this Sunday?

A. Yes, sir.

Q. About what time was it?

A. I would say it was evening, almost, it was not dark, the sun was still up, the sun was low.

Q. It was in the late evening?

A. Yes.

Q. Okay. You stated that you were burning weeds that day?

A. Yes, sir.

Q. How long did you spend burning weeds?

A. All morning until about noon.

Q. Okay. Then what did you do?

A. I laid down. I was very, I got overheated. And I didn't even wash my feet, I was black from burning weeds and I just laid down and rested and went to sleep.

Q. Were you asleep when Randy arrived?

[Page 146]

A. Yes, sir.

Q. What did Randy Guzek say to you?

A. Well, hi, and the usual, how have you been and so on. I told him I was really exhausted. I thought I had heat stroke because I was burning weeds and I got real hot and I was really tired.

He wanted me to go over to Grandpa's with him, something about buying a motor home. I said I'm just too tired, I just can't.

Then I asked if he would check the hot spots on the fire, I was really worried about that, and he did. And I sat up, that's how come I knew the sun was still up.

Q. Let me interrupt you. What do you mean by hot spots?

A. When you are burning under juniper trees, sometimes a piece of wood will just be simmering there and it will work down into the droppings from the juniper tree, and they can smolder and then light up later.

So I had asked him to go and hose those down, because I had the water running out there still. And I sat up and showed him where the area was, and the sun, you could still see the sun was lit, so that's how I'm assuming time-wise.

Q. Did you leave the couch at this time?

A. No, I sat up is all.

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Q. Have you had problems with hot spots before?

A. Oh, yes.

Q. Did Mr. Guzek, your son, do anything with the hot spots?

A. Yes. He went out there. I sat up because I'm really concerned about fire. I have been through many of them. And I looked out and saw him out there watering the area down that I had directed him to do that. And then I laid back down.

Q. Uh-huh.

Q. When's the next time you saw Randy?

A. He came back in, I couldn't tell you how long it was. He sat back down, then asked if I was feeling better, could I go over to Grandpa's.

I said I'm just too tired, Randy, maybe I will later. And he went on over. He left the house. At that point I didn't, went back to sleep.

Q. Okay. He had asked you twice to go over to his grandfather with him?

A. Yes, he did.

Q. Did he ever indicate why he wanted to go, you to go?

A. He wanted to have me to help him make a deal on the motor home. He'd like me to observe, point out any extra things that were necessary.

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Q. Okay. When he said he was going over to Grandpa's, do you know where he was talking about?

A. Yes, that's Grandpa's bus directly back of the property. It's on our property.

Q. Okay. How far--which house do you live in at that address?

A. The biggest house there with the mobile home and addition built onto it.

Q. Okay.

Q. Do you know the name of the man that he refers to as Grandpa?

A. Yes, Clarence Guzek.

Q. So he came back in a second time after, is this after he's done the hot spots?

A. Yes, sir.

Q. And he requested you to go over to his Grandpa's again?

A. Yes, he did.

Q. Then what occurs?

A. I was too tired, I just said I'm just exhausted and I wanted to sleep, and then he left.

Q. What happened next?

A. The next thing I know is my son, Danny, his older brother had come in, and Willie, his friend, and they wanted me to fix them something to eat.

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And I moaned and groaned about it. I was still exhausted. And, I begged off. He said, "Willie, let's get pizza," so he

went to the phone and he called the pizza place, said "we have to get it to go because they are going to close." So I'm assuming that's about 11 o'clock, because that's the time that this pizza parlor closed. Then they drove off.

Next thing I know was they came back with the pizza, set it on the coffe table beside the couch.

Q. Sorry -- if I can interrupt you a minute -- are you familiar with when the pizza place closes?

A. On Sundays they close at 11, yes.

Q. How many children do you have, Mrs. Guzek?

A. Four.

Q. How many boys?

A. Three.

Q. What are their ages?

A. Right now?

Q. Trick question.

A. I can tell you their birthdays. Randy's 18, Danny will be 21 this Monday and Joe is 23.

Q. Having those three boys give you any experience when pizza places close?

A. Absolutely. They could, they could tell you how much how much additional cost, how much for extra [Page 150] pepperoni, you name it.

Q. Uh-huh. Okay. Does, you other son Danny and his friend returned?

A. Yes, they did and they put the pizza on the coffee table, and it was, they were making motions for me to vacate

the premises, they wanted to watch a program on t.v., and that was my cue to get up and go to bed.

Q. Okay. Now where have you been sleeping all this time?

A. On the sofa in the living room.

Q. So that's in front of the t.v., is it?

A. Yeah. The only sitting area in front of the t.v.

Q. What did you do at that point?

A. I got up and I got my feet washed and I went to bed.

Q. Okay. What's the next thing you know of that evening?

A. Willie's truck leaving. He's got a very loud muffler on his truck. I heard that start up. I don't know what time that was, but I was in bed.

Q. Where are you at this time?

A. In my room. It's the, probably the corner closest to the driveway of the house.

Q. Are you in bed?

[Page 151]

A. Yes.

Q. After Willie's truck leaves, did you go back to sleep?

A. Yes.

Q. What happens next?

A. The next thing I remember is Randy waking me up and asking me to make sure I'd set the clock because he needed to get up earlier than usual because he was, had to

stop at where he was staying with my husband's, where ever my husband was residing, Randy was staying with him.

And he had to go there to get his work clothes, because he just had his dress clothes on and he needed to leave earlier. So he wanted me to make sure I set the clock earlier than I'd planned on setting it.

Q. Are you married, Mrs. Guzek?

A. Yes, I am.

Q. Was you husband living with you at this time?

A. No.

Q. Where was he living?

A. At the Jackson Street address.

Q. How long had he been there?

A. Since late October.

Q. And this is June; correct?

A. Yep.

Q. The end of June? Did Randy explain--what time [Page 152] was this?

A. It sticks in my mind, I have a digital clock that has a digital read out, 2:16 sticks in my mind. I believe that's when I, what I saw on the clock when Randy came in.

A lot of times when my kids come in, I will focus on the clock to see what time it is. And 2:16 sticks in my mind.

And then, I can set my clock two ways, two alarms on it. So I set both alarms. And it's got a feature on it that music comes out ten minutes before the alarm actually sounds.

I set the other for 4:30, the other for about five minutes after. When you set the alarm, when you test it, you actually test and it reads out what time you are setting it.

Q. Why did you set it for 4:30?

A. Because he had, to get time to go and get his clean clothes, his work clothes.

Q. Did he tell you when he had to be to work?

A. He said he had to be at work early.

Q. Did he tell you to set it at 4:30?

A. We planned on setting it for 5 o'clock. Then he came, I assuming he was figuring that he would go home that night, but when he didn't, that he'd had to get his [Page 153] work clothes and had to have more time to do that.

Q. Uh-huh. Did he indicate that, in other words, he indicated he was going to stay at your house?

A. Yes, that he was beat, had to stay.

Q. Okay.

Q. Did the alarm work?

A. Oh, yes. It, the radio came on at 20 after 4, and I called to Randy, and he wasn't answering. I called him several times, finally I had to get up and go out and shake him awake.

He was sleeping on the love seat on the deck, and covers were coming off and the dog was on the covers on the floor. And I got him up, he got up and went to the bathroom, and I went back to bed and he drove away.

Q. Did you hear him drive away?

A. Yes, I did.

Q. Did you see him any more that day?

A. No, sir, I did not.

Q. Okay.

A. Could I say there --

MR. BROWN: Objection, not responsive.

THE COURT: Wait for another question.

A. I'm sorry.

MR. KITTREDGE: Q. Just kind of checking here. You telling the truth?

[Page 154]

A. Yes, sir.

Q. Would you lie for you son?

A. No, I would not.

MR. KITTREDGE: No more questions.

CROSS EXAMINATION

BY MR. BROWN:

Q. Mrs. Guzek, the Defendant moved over to the Jackson Street residence approximately March of 1987?

A. Yes, sir.

Q. When did you first realize that the Housers had been murdered?

A. I'm not sure if I heard it on the news on television or radio. Usually I wake up to the radio every morning.

I could have heard it on the radio. It seems to me that Randy had called me a couple days after the fact saying that that was, the people that were killed were Ann Houser's relatives.

And Ann Houser had, was an acquaintance of Randy's, that she had come, she was also an acquaintance of my daughter's and she had spent a day overnight at our house.

Q. You didn't have any reason to look back on Sunday, June 28th and figure out what had occurred until they came up with the search warrant to you residence?

[Page 155]

A. This is true.

Q. You had that Sunday off and the next day, June 29th, off?

A. Yes.

Q. Do you recall how many Sundays, Sunday and Monday combinations you had off during that period of time?

A. Up to that time, I had almost every Sunday-Monday off. I was, I'm head sales girl and the person has the right to have the right to have the preferable days off. And that was the best that worked for the schedule of the bakery.

Q. Did you testify at the grand jury, ma'am, last October?

A. Yes, I did.

Q. Do you remember telling the Deschutes county grand jury that your days off had just changed?

A. That they had been Sunday-Monday, and that I was working on going on vacation and I'd arranged with my manager, the bakery manager that I could take Sunday-Monday off, then I would work straight through till the following, through the following Thursday.

Because I would work Tuesday, Wednesday, Thursday, Friday, Saturday, Sunday, Monday, Tuesday, Wednesday, Thursday, and then I would be able to take the [Page 156] Fri-

day and Saturday off, my week's vacation and then Sunday and Monday. I'd prearranged this with my baker.

Q. So did you tell the grand jury that your days off had just changed on June 28th, or did you not say that?

A. I don't understand.

Q. Did you tell the grand jury that your days off had just changed on June 28th?

A. I, why would I say they were, would change on June 28th? I don't understand that exact question.

Q. Okay.

A. If that's what I said, I don't, I don't recall having said that.

Q. Okay. You didn't actually see you son from about 2:30 that morning until 4:30 that morning; is that accurate?

A. Right.

Q. Did you see him the day prior?

A. Saturday?

Q. Yes.

A. I was at work, I don't believe I did, no, sir.

Q. When did you see him again?

A. Randy?

Q. Yes, after Sunday?

A. After Sunday?

[Page 157]

Q. Yes.

A. The next that I know of exactly is Wednesday, he possibly could have come by my job, which many times he did after he had got off his shift where he was working.

When he got back to Redmond, he would stop in at the bakery many times. But Wednesday particularly, he'd asked if I wanted to go into town to have a hamburger with Grandpa and Grandma.

A. Were you aware that you son went to Reno sometime later that week?

A. After the fact, yes, sir.

Q. Now you talked about you son, Danny, having been there with a friend?

A. Yep.

Q. Was he there the next day when you got up?

A. Danny?

Q. Yes.

A. Yes.

Q. And why don't you tell us about that, what were the circumstances, who got up first between yourself and your son Danny?

A. I do not recall who got up first. That being a day off, I slept in,. 7:30 is sleeping in.

MR. KITTREDGE: I believe this is beyond the scope of Direct, Your Honor. Objection.

[Page 158]

THE COURT: You want to be heard on that?

MR. BROWN: Well, they walked right up to the time and day. I'm talking about just testing her recollection on that.

THE COURT: Well, I will overrule.

MR. BROWN: Q. Do you remember telling the Deschutes County grand jury that you would say he was gone definitely when you got up that day?

A. That I said Danny was gone?

Q. Yes.

A. I do not recall that, no, sir.

Q. You remember telling the grand jury that you thought that he had, you son Danny had gone to Portland that particular day?

A. I don't recall having said that. I may have said that, I don't recall though.

Q. Well, did you see your father-in-law that day, Sunday, June 28th?

A. Yes.

Q. What time of the day did you see him?

A. When we were burning weeds in the morning.

Q. Do you have anything in writing, ma'am, as to what occurred on June 28th?

A. At, I don't understand what --

Q. I'm sorry, I didn't state it very well. Did [Page 159] you write anything down back at that period as to what occurred on June 28th?

A. No, sir.

Q. Do you remember, do you know any State Police officers by the name of Lynn Fredrickson?

A. Yes, sir.

Q. Do you recall speaking with Detective Fredrickson on August 31st, 1987?

A. The dates I can't be specific, but I recall having talked to Mr. Fredrickson, yes.

Q. Do you recall on that date, August 31st, telling the Detective Fredrickson that you work the Defendant up at 5:30 am?

A. He's--no, sir.

Q. I need to specify, you don't remember it or you didn't say that?

A. I didn't say that.

Q. Do you remember taking to Detective Fredrickson and Detective Little in November, November 19th, 1987?

A. Fredrickson and Little together?

Q. Yes, I believe so. Or at least Fredrickson?

A. The dates I cannot recall precisely as to when I would have talked to different officers. Usually, Mr. Fredrickson came by my employment numerous times.

[Page 160]

I'm not sure if that's the time he said he wanted to talk to me about my daughter, and he came up to our house, and all he talked about, he talked about what transpired that day of the killing.

We never talked about Tammy other that he said something about she was at camp or that was, that may have been that time.

Q. Mrs. Guzek, did you tell Detective Fredrickson on November 19th, 1987, that you only had one Sunday and Monday combination off during June of 1987?

A. No, sir.

Q. Do you remember telling detective Fredrickson on November 19th 1987, that you only had that one Sunday and Monday off in June of 1987, and if you had more than one Sunday and Monday off during that month, then you'd have to say that you were wrong about June 28th or confused about that date?

A. No, sir.

Q. Do you know a lady by the name of Donna Thom?

A. Yes, I do.

Q. She's about 40 years of age, I believe?

A. Yes.

Q. Does she work with you?

A. She does.

Q. How long has she worked with you?

[Page 161]

A. I believe since April.

Q. Would that be April of last year, I believe?

A. Yes, sir.

Q. Did you ever talk with her about your son's arrest?

A. I probably talked to all of the employees at work in regards to the case.

Q. Did you ever recall speaking with Mrs. Thom personally, just you and her, about the Defendant and the particular weekend we have been talking about here?

A. As far as recollection of a specific conversation of that, no, but I say I have talked to all of the employees at various times.

Q. I'm sorry. Go about a month after your son was arrested. Do you remember having a conversation with her alone about you son?

A. Time-wise I do not recall, no sir.

Q. Do you remember telling Mrs. Thom about a month after your son's arrest that the Defendant was home all weekend with you, the weekend of the murders?

A. No, sir. Not at all.

Q. You didn't say it or you don't recall it?

A. I did not say that.

Q. Do you recall telling Mrs. Thom that he was home all that weekend except for a half hour when he went [Page 162] on a short ride with a friend?

A. Not at all.

Q. You thought it was to test drive a car. Remember anything about that?

A. None whatsoever. It's totally foreign, what you are saying is totally foreign to me.

Q. You remember Mrs. Thom asking you why you didn't call the police and tell them about the fact that the Defendant was home with you the whole time?

A. In part of the conversation, that I have talked to with different people, shall I, at that point I had not been contacted by the police as to what I could attest to.

Q. My question was did you tell her about a month after your son's arrest, excuse me, did she tell you about a month

after your son's arrest, "why didn't you go call the police and tell them about this, if he was there all weekend?"

A. I do not recollect her saying such a thing.

Q. You remember telling her as part of the same conversation "wouldn't you lie if it was your son?"

A. No, sir. Absolutely not. I wouldn't do it.

Q. Well, did you tell her that?

A. No, sir.

MR. BROWN: No further questions.

REDIRECT EXAMINATION

[Page 163]

BY MR. KITTREDGE:

Q. Mrs. Guzek, when was the first time you were ever contacted by the police?

A. I cannot recall. It was quite a while after, I believe, other than Mr. Fredrickson, and I don't recall when his visits were, the grand jury was probably the first time that I actually, other than talking to your investigator, I think that grand jury maybe.

Q. You recall when the grand jury, when you went to grand jury?

A. It was in the fall, October or November, I think.

Q. So several months after this incident?

A. Yes.

Q. Before any police officer ever contacted you at all?

A. That is true.

Q. Were officers at you home on January, or July 9th?

A. Yes, they were.

Q. Did anybody ask you what you had to say about this case?

A. Not if I knew anything, where Randy was or, no, they never asked me. They asked if Randy had brought things into the house and I said he did not.

[Page 164]

Q. Are there outbuildings on the property where you live?

A. Yes, sir, many.

Q. Do you , do you control those buildings?

A. No, sir.

Q. Who does?

A. My husband had his personal things in there, and he kept them locked from me.

Q. Is this something that's happened since your separation?

A. He had them locked prior. He changed locks numerous times, but he, it was, he had changed all the locks since the separation again, yes.

Q. But he had them locked with his locks long before you separated?

A. Yes, sir.

Q. Did you have access to any of those outbuildings?

A. No, sir.

Q. How many times have you been interviewed since October or November concerning this incident?

A. I cannot recall. There's numerous legal goings on, and I can not differentiate how many times I was approached on Randy's or Danny's or Tammy's.

Q. Did you see the police break the locks off of [Page 165] those outbuildings during the execution of the search warrant on July 9th?

A. Yes, I did.

MR. KITTREDGE: Okay, I have no more questions.

MR. BROWN: Nothing further.

THE COURT: Thank you, you can step down.

A. Can I hug my son?

MR. BROWN: Objection.

THE COURT: No, you can't.

MR. BROWN: I'd ask the Court for a short recess.

THE COURT: Want a a recess?

MR. KITTREDGE: Fine, yes.

THE COURT: Let's take about a ten minute recess. The Jury's excused.

THE COURT: We'll be in recess ten minutes.

(recess)

Be seated. I want Counsel to understand when I say it's ten minutes, I want you back at counsel table before the ten minutes are up. I'm tired of having the Bailiff chase all over the courthouse to find Counsel. Let's have the jury.

MR. KITTREDGE: Defense rests, Your Honor.

* * * * *

Supreme Court, U.S.
FILED
JUL 21 2005
OFFICE OF THE CLERK

No. 04-928

In the Supreme Court of the United States

STATE OF OREGON,

Petitioner,

v.

RANDY LEE GUZEK,

Respondent.

Petition for Writ of Certiorari to the Oregon Supreme Court

JOINT APPENDIX VOLUME II

HARDY MYERS
Attorney General of Oregon
PETER SHEPHERD
Deputy Attorney General
***MARY H. WILLIAMS**
Solicitor General
400 Justice Building
Salem, Oregon 97301-4096
Phone: (503) 378-4402
Counsel for Petitioner

***RICHARD L. WOLF**
Attorney at Law
12940 NW Marina Wy Slip A
Portland, Oregon 97231
Phone: (503) 384-0910
Counsel for Respondent

*Counsel of Record

PETITION FOR CERTIORARI FILED January 5, 2005
CERTIORARI GRANTED April 25, 2005

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF DESCHUTES

STATE OF OREGON, Case No. 87CR0373TM

Plaintiff,

v.

RANDY LEE GUZEK,

Defendant.

TRANSCRIPT OF PROCEEDINGS
Hearing Motions

Day of: May 21st, 1997
9:00 a.m.

BEFORE: THE HONORABLE PIERRE L. VAN RYSSELBERGHE
APPEARANCES:

For the Plaintiff: MR. JOSH MARQUIS
District Attorney
MR. F.J. MALONEY
Deputy District Attorney
Bend, Oregon

For the Defendant: MR. DUANE MCCABE
Attorney at Law
MR. JONATHAN ASH
Attorney at Law
Bend, Oregon

Reporter: Linda Phillips

[Page 84]

THE COURT: Mr. Marquis, did you have any other matters you wanted to raise at this time?

MR. MARQUIS: The only two issues, one had to do -- I guess if it's necessary, the state will file a motion in liminie, we will do that, if there is any question about the idea of Mr. Guzek being able to relitigate his guilt.

It's an interesting issue as to whether decisions made by a prior judge in a case have any law of the case kind [Page 85] of holding. They may not. I don't know. Your Honor is probably not bound by all those same decisions.

That leads into my other concern which was that has to do with the duration of the trial. We had some brief discussion about this in chambers. The state intends to put on essentially the case it did last time. I believe we took about ten days to two weeks to present our evidence. And with the small amount of additional evidence, I can't imagine taking longer than that. I expect that the jury selection will take about a week. And I have always assumed from our conversations that the defense would take two to three weeks to present its case which means about a six week at most case.

I was a little concerned because I saw in the jury questionnaire that it said that it might take more than two months and I was really concerned when we talked in chambers and Mr. McCabe made reference to the Hernandez case which took seven months. Obviously both for the court's scheduling and for Your Honor's and Deschutes County Court, I think we have to have some grip on where it's at. Frankly, my ability to be the prosecutor in this case would be hampered if it took six months. As the court knows, I'm the district attorney in another county and I'm trying this as a special prosecutor. There is no financial issue involved, but I have a constituency and a jurisdiction. Now Mr. McCabe may

say [Page 86] that's the state's problem, they can choose whomever they want as a prosecutor. That's true, but I'm concerned about Mr. McCabe indicating that there is some huge open end for the trial and that we would be in trial into 1998.

Along those same lines, I'm also asking the court I guess to place a discovery deadline, at least a preliminary one, which the state intends to honor as well in terms of presentation of witness lists both from the state to the defense and from the defense to the state. I think probably two weeks from now would be fine. As I indicated, I intend to get the witness list to Mr. McCabe by the end of this week.

We have not received, to my knowledge at least, any discovery from the defense and obviously, unless counsel is going to argue that the state's reciprocal discovery laws do not apply, the state is also entitled and also expects, frankly without having to file a motion to compel, that we would be provided the statements of any witnesses and the reports of any experts who the defense intends to call.

I've always had the belief that it was assumed that both parties would comply with discovery and it was only on refusal to comply with discovery that a motion to compel is appropriate. Maybe I've muddied those two issues, but the length of the trial and the discovery, I think, are somewhat related to each other.

[Page 87]

THE COURT: Okay. Mr. McCabe.

MR. MCCABE: Thank you. I'm not sure how many issues Mr. Marquis touched on. I want to be real clear on how we view this case.

Mr. Guzek is entitled to rebut every piece of evidence that the state puts in. If that means that it's rebutted with evidence

that either has been or traditionally would be found in a guilt trial, then that's the position we'll take. I don't want to mislead anyone. The state cannot have its cake and eat it too. I cannot say that guilt has been determined and then put on a guilt case. They just can't do that. We have the absolute right to rebut. Every fact that goes to the circumstances of the offense is admissible and if it's mitigation, it would be error not to allow that in.

I do not agree with Judge Mosgrove's decisions regarding whether or not certain evidence could be put on at the last trial, so I'm suggesting that Your Honor will have to review that issue. Perhaps it would be a wise idea to put a briefing schedule on that as well so we don't get caught short during trial.

The state is going to put on certain evidence and certain witnesses and then we are going to have to decide how to rebut that. Now that I have a better idea of what the state intends to do, I think Mr. Ash and I and our [Page 88] investigators can sit down and make those decisions. But without getting into too much detail, I think that this is an issue that there will be some argument about.

THE COURT: I think if the state presents evidence that something happened and somebody was seen driving into a driveway, at least in the guilt stage, and it was a blue car, I think defense is entitled to say, no, it was a red pickup or it didn't happen.

But at this point, I don't share the view that the question of guilt is an issue, it is not an issue. So I understand what you're saying, you may want to nit-pick or talk about or contradict assertions. Just because it comes in from a live witness, doesn't mean it can't be disputed either on cross-examination or in the defense's case and I think you're making that clear.

I think the court is entitled to ask of counsel as this thing moves along for its opinion with respect to the duration of the trial. I don't see any reason for a six month trial. I'm kind of looking at eight weeks, but I don't know where I'm getting that, but that's what I'm looking at and I'd be surprised if it goes appreciably longer. I mean I would think it might be a little bit less than that or a little bit longer than that.

* * * * *

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF DESCHUTES

STATE OF OREGON, Case No. 87CR0373TM

Plaintiff,

v.

RANDY LEE GUZEK,

Defendant.

TRANSCRIPT OF PROCEEDINGS
Hearing Motions

Day of: September 8th, 1997
10:00 a.m.

BEFORE: THE HONORABLE PIERRE L. VAN RYSSELBERGHE
APPEARANCES:

For the Plaintiff: MR. JOSH MARQUIS
District Attorney
Bend, Oregon

For the Defendant: MR. DUANE MCCABE
Attorney at Law
MR. JONATHAN ASH
Attorney at Law
Bend, Oregon

Reporter: P. Clark

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[THE COURT:]

Now I'm going to review this list with you. It seems to me the only one remaining which is a recent motion is that pertained alibi?

MR. MARQUIS: And there is also the new, the brand new filing for motion for proportionality reviewed by the trial court that was filed, I got it on August 29th. It looked almost identical to the one that was reviewed and denied by the court, but I think in that case Mr. Ash was asking for a motion for proportionality review by the jury and now they are asking for the court to do a trial. I'm not sure.

In any event, it would involve considerable amount of testimony and I want, since as I understand it, our last day before the 23rd of September, to resolve it.

THE COURT: I understand. Could we take the alibi first and then maybe the proportionality?

MR. MCCABE: Certainly, Your Honor.

THE COURT: Okay. I'll hear you on that.

MR. MCCABE: It's just a notice, Your Honor.

MR. MARQUIS: Your Honor, defense is not entitled to the notice of alibi because alibi goes to presenting evidence to attempt to convince the jury that the defendant didn't do this. That issue, as the court has pointed out, has been affirmed by the court. This just will be told, as may other juries where they are being [Page 159 resentenced, whether they are facing death or true life or life with possibility of parole where the guilt of the defendant is not for them to determine, it's been established.

I vividly recall standing in this courtroom and having this conversation and I believe that my recollection was the court

said that would not preclude defense counsel from examining witnesses as to their recollections. And if a witness said, no, I saw Mr. Guzek driving a red car and, in fact it was a blue car, counsel would be entitled to do that and would be entitled to argue to the jury that the person's perceptions weren't accurate. I think that was the example the court used.

But to file notice of alibi, this very issue came up before Judge Mosgrove last time with other counsel and Judge Mosgrove -- again and it's not binding on this court -- made it absolutely clear that the defense was not entitled to relitigate guilt. That has been determined. The only purpose of notice of alibi is to say Randy Guzek wasn't there, he was someplace else.

Again, I'm quite concerned about the filing of this notice because what it does is it says the state is going to be required to relitigate guilt. And although counsel has said that the state is going to put on all this evidence, there is a considerable difference between retrying a penalty [Page 160] phase case and actually retrying the guilt phase. We wouldn't be talking about seven or eight days, which is what I've estimated for the state's case, we'd be talking about a considerable amount longer than that.

And the reason that I'm concerned about this is that there has been no mention of this since the court made it's, I think appropriate ruling on May the 20th or the 21st, 23rd, whatever day we were in court, and now all of a sudden it's oh, by the way, we're going to bring up alibi.

Counsel says it's simply a notice of it. I'd like the -- I think the issue, unfortunately, is right before the court as to whether or not the defendant is going to be allowed to put on evidence that attempts to prove that he was not guilty of these offenses.

THE COURT: Any further comment?

MR. MCCABE: Your Honor, I made it very clear that alibi is being offered as mitigation. It goes to the circumstances of the crime. It's mitigating evidence that someone is not there. A defendant is entitled to put on that evidence as mitigation because if the state is going to put on all the evidence it wishes to as it relates to the guilt, then, mitigating evidence should be admissible just as well.

I don't see where you can draw the line because if you allow the state to put in all this evidence of guilt, [Page 161] deny the defendant the right to put on his mitigating evidence -- Circumstances of the offense is part of the fourth question. If you're not there, that is certainly mitigating.

THE COURT: Well, this is not a motion in liminie, it's a notice, it's a question of relevancy, and I would expect to hear an appropriate objection and the court is going to make a ruling.

It seems to me it's a question of why is a piece of information offered by sworn testimony or by exhibit, what inference attaches. And if the inference bears upon a issue that pertains to a question of penalty and not guilt, you can anticipate the court is going to rule it inadmissible.

On the other hand, if the inference is a proper one, whatever the piece of evidence is on the issue of penalty, it may considered.

MR. MARQUIS: I understand, Your Honor. I am concerned, however, that Mr. McCabe is going to stand up in an opening statement to this jury and tell them that the defense is going to present evidence that Mr. Guzek didn't do it. When that bell has been rung, there is no way to unring it.

THE COURT: I understand. It's not a motion in liminie. That's been noted.

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MR. MARQUIS: Well, then I'll tell the court right now I will file a motion in liminie to prevent the defense from doing that until and unless the court has had an opportunity out of the presence of the jury to allow that.

I believe otherwise, defense counsel is going to tell the jury in opening statement that Mr. Guzek didn't do it and that the state won't be able to prove that.

THE COURT: See, the jury is going to be told early on that this is not a question of guilt or innocence. The jury is going to be told that he has been found guilty and this is the penalty phase. That's what the jury is going to be told.

I don't intend for evidence to be offered that's inconsistent with that representation to the jury. It's a question of what the evidence is, what the inference is, the intended inference and whether it's relevant.

Mr. McCabe has provided a notice and I think Mr. Marquis is going to file a motion in response and whether that deals with it, we'll see.

But I would say this, even parenthetically now, and I've said it once and I don't want to belabor it, but I would expect that counsel would not present the jury with representations that are inconsistent with either the introduction of the case, which you have before you, and what the instructions are likely to be.

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF DESCHUTES

STATE OF OREGON, Case No. 87-CR-0373-TM

Plaintiff,

v.

RANDY LEE GUZEK,

Defendant.

JURY TRIAL

OCTOBER 24, 1997

VOLUME VIII

BEFORE: THE HONORABLE PIERRE L. VAN RYSSELBERGHE Circuit Court Judge of Deschutes County, *pro tem*

APPEARANCES:

For the State: Joshua Marquis
Deschutes County DA's Office
1164 NW Bond Street
Bend, Oregon 97701

For the Defendant: Mr. Duane McCabe
Jonathan Ash
Attorneys at Law
44 NW Irving
Bend, Oregon 97701

COURT REPORTER: C. Rudishauser

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MR. MARQUIS: Your Honor, I need to make this witness mine at this time, and I'll ask different questions.

THE COURT: Very well.

DIRECT EXAMINATION [OF N. MEFFORD]

BY MR. MARQUIS:

Q. Can you give the jury any examples of how you believe you were manipulated by Randy Guzek?

MR. MCCABE: Objection, Your Honor, calls for a conclusion and opinion.

THE COURT: It's overruled.

Q. Go ahead.

A. I've had letter within the last eight years --

MR. MCCABE: Your Honor, I'd like to be heard at this time outside the presence of the jury.

THE COURT: Okay. I'll excuse the jury.

(Jury exits)

THE COURT: Mr. McCabe?

MR. MCCABE: Thank you, Your Honor. Your Honor, it is our position that even the issue of manipulation is not relevant to this proceeding. Nowhere in the statutes does it state that manipulation is an aggravating factor. Counsel has gone on and on about this issue of manipulation. Because it is not relevant to any of the questions that need to be answered, I would ask that it be excluded on that basis. Secondly, now he's trying to get into specific acts of manipulation, which our position would be, since it's [Page 23] his witness, and it goes to character trait, he's not entitled to get into specific acts. And I think counsel's raised that issue as, as a shield to keep

our cross-examination regarding some of his witnesses. If the court deems that manipulation is a relevant character trait, then all that counsel can elicit is her opinion, same manner in which you could as it related to truthfulness or peacefulness. But you cannot get into specifics. The issues that counsel wants to get into deal with communication between this witness and my client. I suspect it will try to get into issues of his denial of responsibility, which the court has ruled long ago is not at issue here. And we have been precluded from putting on any evidence of innocence by the court's early rulings, and we have abided by that. If counsel opens up this door by arguing that specific statements of denial of responsibility somehow go to these issues, then we should be entitled to open up the entire case. Because if we're not able to do so, then Randy Guzek will be horribly prejudiced in this situation. It's a violation of his rights under the Oregon Constitution Article One, Section Ten, Eleven, Twelve, Fifteen, Sixteen, Twenty, Twenty-One and Thirty-Three. It's a violation of his rights under the United State Constitution, Amendments Five, Six, Eight, Fourteen, and in particular, the due process clause. What happens is, the State is able to put on evidence of deniability, of lack of responsibility. Defendant is precluded from putting on any evidence such as alibi evidence that counsel has tried to over and over again make certain there is no mention of even, let alone the evidence. It creates for [Page 24] an unreliable sentencing hearing. It is in violation of *Oregon v. Wardius*, in that there is no reciprocity. So the State is able to take potshots and we are not able to rebut. And it is on all those bases that I ask the court to limit, if there's any relevance at all, this witness's testimony as to her opinion, but not specific acts.

MR. MARQUIS: Well, Your Honor, counsel is making some interesting sort of legal flailings, but this trial is about Mr. Guzek, and it's about all of the acts that he commits. And

it's not, we're not limited to simple opinions about whether somebody's truthful or whether somebody's manipulative. There's already been expert testimony laid for a foundation as to the characteristics of a sociopath. And the issue of, I think the court has made clear that the absence of stating remorse is one thing, that that cannot be commented on. But certainly, statements that the defendant chooses to make to anybody are admissible, and certainly in the context of what this witness is testifying to. And I honestly don't know, I mean, we can proceed with an offer of proof, because I'm not sure exactly what this witness is going to say. But in any event, I believe we're entitled to get this testimony out, and whether or not Mr. Guzek has manipulated people and manipulated witnesses and manipulated this young woman in particular, is incredibly probative, and she'd not only testified that she has knowledge, but that she was involved with him at about the time of the murders.

THE COURT: Well, it's my view that certainly there has been evidence of manipulation, I think manipulation is a relevant [Page 25] consideration for the jury. Further, character is a relevant consideration, and it may well bear on the third question, but it certainly bears on the second question. So the objection's overruled. Ready to go?

MR. MARQUIS: Does counsel wish to do this out of the presence of the jury, see what the answers are going to be?

MR. MCCABE: Yes, please.

THE COURT: Okay. Go ahead.

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF DESCHUTES

STATE OF OREGON,

Plaintiff,

v.

RANDY LEE GUZEK,

Defendant.

Case No. 87-CR-0373-TM

NOTICE OF INTENT TO RELY ON EVIDENCE OF ALIBI AS MITIGATING EVIDENCE

Lawyers for Randy Guzek hereby give notice of intent to rely on evidence commonly called alibi evidence as relevant mitigating evidence. The following is provided pursuant to the mandate of ORS 135.455:

1. The prior court testimony of Clarence Guzek, since deceased, will be offered to prove that on June 28, 1987 from approximately 9:00 pm until June 29, 1987 at approximately 2:00 am Randy Guzek was in the presence of and at the home of Clarence Guzek on Walnut Street in Redmond, Oregon.

2. The testimony of Kathleen Guzek will be offered to prove that on June 29, 1987 she noted that at 2:16 am defendant asked her to set the alarm clock as he had to get up early for work the next day. The location of this conversation was at her residence on Walnut Street in Redmond, Oregon. She will further testify that when the alarm woke her at 4:20 am on June 29, 1987 she woke the defendant who was sleeping on a love seat on the deck of her house.

DATED this 20th day of August, 1997

/s/ Duane J. McCabe
Duane J. McCabe, OSB#74214
Lawyer for Randy Guzek

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF DESCHUTES

STATE OF OREGON, Plaintiff, v. RANDY LEE GUZEK, Defendant.	Case No. 87-CR-0373-TM MEMORANDUM IN SUPPORT OF ADMISSIBILITY OF MITIGATING EVIDENCE

DEFENDANT IS ENTITLED TO INTRODUCE ALL MITIGATING EVIDENCE

1. Statutory Basis.

ORS 163.150(1)(b)(D)and(1)(c) (1989) which defendant asserts is the proper statute to apply to his case, or ORS 163.150(1)(c)(A)(B) (1997) which the court has ruled governs this matter, provides that all relevant mitigating evidence shall be presented to the jury for its consideration. Both versions of the statute provide that the jury shall consider in deciding whether defendant shall receive a sentence of death evidence of defendant history, background and the circumstances of the offense. The Oregon Supreme Court has held that "all aspects of a defendant's character and background are "relevant to sentence," should defendant receive a death sentence?" *State v. Wagner*, 309 Or 5, 19, 786 P2d 93 (1990).

2. Oregon Constitutional Basis.

a. State v. Wagner.

It is submitted that as a matter of Oregon Constitutional law, under Article I, sections 10, 11, 12, 15, 16, 20, 21, 33 and 40 in a death penalty sentencing hearing the jury, which must

make all sentencing decisions, see *State v. Smith*, 319 Or 37, 872 P2d 966 (1994) must consider any aspect of the defendant's character and record or any circumstance of the offense as an independent mitigating factor which makes defendant less deserving of death.

b. Article I, section 11 right to present a defense

Article I, section 11 of the Oregon Constitution protects both the defendant's right to the attendance of witnesses and the right to have the testimony of the witness. The fundamental right that Article I, section 11 protects is "the right to present a defense, the right to present the defendant's version of the facts." *State v. Lajoie*, 316 Or 63, 90-91, 849 P2d 479 (1993). Article I, section 11 is to be construed in the same manner as the federal counterpart construed in *Washington v. Texas*, 388 US 14, 87 S Ct 1920, 18 L Ed2d 1019 (1967). *State v. Lajoie, supra*, at 90. The case of *Chambers v. Mississippi*, 415 US 284, 302, 93 S Ct 1038, 35 L Ed2d 297 (1973) is a case cited in *State v. Lajoie*, which gives definition to what the "right to present a defense" means. The *Chambers* court invalidated a state's hearsay rule because it prevented a defendant from presenting witnesses in his own defense. The court held that a defendant's Fourteenth Amendment due process rights to a fair trial were denied in the mechanistically application of the state's evidence rule.

3. Federal Constitutional Basis.

a. Eighth Amendment Basis.

A defendant has a constitutional right under the Eighth and Fourteenth Amendments to the United States Constitution to present all relevant evidence which mitigates in favor of a sentence less than death. *Payne v. Tennessee*, 501 US 808, 822, 111 S Ct 2597, 2602, 115 L Ed2d 720 (1991); *Eddings v. Oklahoma*, 455 US 104, 114, 102 S Ct 869, 877, 71 L Ed2d 1 (1982); *State v. Wright*, 323 Or 8, ___ P2d ___, (1996).

States may not limit the introduction of evidence in mitigation of sentence at a capital sentencing hearing by way of the express wording of a statue. *Lockett v. Ohio*, 438 US 586, 57 L Ed2d 973, 98 S Ct 2954 (1978). States may not limit the introduction of mitigating evidence by a restricted interpretation of the statue which fails to channel the sentencing authority to give consideration to mitigating evidence. *Penry v. Lynaugh*, 494 US 302, 109 S Ct 2934, 106 L Ed2d 930 (1989). States may not limit the introduction of evidence in mitigation of sentence at a capital sentencing hearing by way of the express wording of a statue. *Green v. Georgia*, 442 US 95 (1979). States may not limit introduction of or effect of mitigating evidence by instructions to the jury. *Hitchcock v. Dugger*, 481 US 393, 107 S Ct 1821, 95 L Ed2d 347 (1987). States may not limit from considering all relevant mitigating evidence by jury verdict form. *Mills v. Maryland*, 486 US 367, 108 S Ct 1860, 100 L Ed2d 384 (1988); or by requiring by statue that a jury be unanimous in finding mitigating circumstances. *McKoy v. North Carolina*, 494 US 433, 110 S Ct 1227, 108 L Ed2d 369 (1990).

b. Fourteenth Amendment--Due Process Basis.

State rules of evidence may not be applied in a manner which prevents the sentencing authority from considering otherwise relevant evidence critical to the issue of punishment in a capital sentencing trial. *Green v. Georgia*, 442 US 95, 60 L Ed2d 738, 99 S Ct 2150 (1979). In *Green* the Court held that the Georgia evidence rule against the admission of a hearsay statement of a co-defendant must give way to the defendant's right to a fair trial under the Fourteenth Amendment to the United States Constitution when the evidence is highly relevant and substantial reasons exist to assume its reliability.

Also applicable to this constitutional principle is the case of *Chambers v. Mississippi*, *410 US* 284, 302, discussed

above. It is important to note that in addition to the application of the Fourteenth Amendment Due Process clause, this fundamental right to present a defense in compasses the Sixth Amendment rights to confrontation and compulsory process. *State v. Lajoie, supra,* at 91 n.12.

Recent cases from the 9th Circuit Court of Appeals firmly establishes that in a death penalty sentencing hearing the mechanical application of state evidentiary rules must give way the more important aspect of a defendant's Due Process right to a fair trial under the Fourteenth Amendment and the Sixth and Eighth Amendments right to present all relevant mitigating evidence. In *Rupe v. Wood*, 93 F3d 1434 (9th Cir 1996), the court held that the trial court erred in excluding evidence of the results of a polygraph test on the state's chief witness, Rupe's accomplice, offered in mitigation, where that evidence supported Rupe's theory that the witness played a greater role then he admitted and where it was not so unreliable that it totally lacked probative value. The *Rupe* holding is based upon the cases cited above, as well as the specific holding of *Mak v. Blodgett*, 970 F2d 614 (9th Cir 1992), *cert. denied*, 507 US 951, 113 S Ct 1363 (1993) that a trial court can exclude evidence in a penalty phase hearing if it is irrelevant, but a trial court cannot preclude any relevant mitigating evidence. 970 F2d at 623, citing *Skipper v. South Carolina*, 476 US 1,4.

EVIDENCE IS CONSTITUTIONALLY REQUIRED

The prosecutor will, as he did last time, stress to the jury the probable future dangerousness of defendant as the primary reason to sentence defendant to death. *Simmons v. South Carolina,* 512 US 154, 159, 112 S Ct 1723, 114 L Ed2d 309 (1994) gives to defendant a Fourteenth Amendment due process right to adequately rebut and put on evidence of the sentence a defendant will actually serve.

DATED this 21st day of October, 1997.

/s/ Duane J. McCabe
Duane J. McCabe, OSB#74214
Lawyer for Randy Guzek

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF DESCHUTES

STATE OF OREGON, Case No. 87-CR-0373-TM

Plaintiff,

v.

RANDY LEE GUZEK, JUDGMENT

Defendant.

Date of Appearance: November 10, 1997

The Honorable Pierre L. Van Rysselberghe	
Joshua K. Marquis	Special Prosecutor
F.J. Maloney	Deputy Special Prosecutor
Duane McCabe	Defense Attorney
Jon Ash	Defense Attorneys
C. Rudishauser	Recorder

OFFENSES

AGGRAVATED MURDER (Count I)

AGGRAVATED MURDER (Count II)

On November 5, 1997, the jury impaneled in the above entitled cause having answered each of the questions as to the death penalty unanimously and in the affirmative,

The Court hereby orders that, as to the Aggravated Murder of Rod Houser (Count I), Defendant is sentenced to death by lethal injection.

The Court hereby orders that, as to the Aggravated Murder of Lois Houser (Count II), Defendant is sentenced to death by lethal injection.

Defendant's right of appeal was given.

Defendant is remanded to the custody of the Sheriff for delivery within 20 days from the time of judgment to the Superintendent of the Oregon State Penitentiary pending the determination of the automatic and direct review by the Supreme Court.

Dated this 10th day of November, 1997.

/s/ Pierre L. Van Rysselberghe
PIERRE L. VAN RYSSELBERGHE
CIRCUIT COURT JUDGE

[From Appellant's Opening Brief Filed in the Oregon Supreme Court 10/2000]

[Page 326]

ASSIGNMENT OF ERROR NO. 16

The trial court erred in denying Appellant's motion to exclude testimony by transcript, in denying Appellant's motion to strike the transcript testimony of Mark Wilson and Donald Ross Cathey, and in allowing such testimony to be read by surrogates to the jury.

ASSIGNMENT OF ERROR NO. 17

The trial court erred in allowing evidence of the plea agreements of Mark Wilson and Donald Ross Cathey before the jury.

ASSIGNMENT OF ERROR NO. 18

The trial court erred in excluding testimony and evidence impeaching the transcript testimony of Mark Wilson and Donald Ross Cathey.

ASSIGNMENT OF ERROR NO. 19

The trial court erred in excluding any defense evidence of alibi or other evidence tending to negate guilt, in answer to and in impeachment of the transcript testimony of Mark Wilson and Donald Ross Cathey.

Pertinent Portions of Record

Appellant incorporates, for purposes of these assignments of error the relevant portions of the record in support of his Assignments of Error Nos. 10, 11, 13, 14, and 15. Appellant further relies upon the following pertinent portions of record.

On May 20, 1997, Appellant filed a *Motion to Exclude Testimony by Transcript*, together with a supporting legal memorandum, seeking to exclude the testimony by transcript

of co-defendants Mark Wilson and Donald Ross Cathey, asserting a lack of statutory authority for such testimony, that such testimony would deny Appellant his federal and state confrontation rights, and that such procedure would violate the Due Process Clause. [Case Register: Event No. 590; App. I:1-14]. This motion was denied by order dated September 11, 1997. [App. I:33].

On October 9, 1997, Appellant moved the court for an order striking the previous testimony of Donald Ross Cathey and Mark Wilson, together with a memorandum in support and copies of the plea agreements of Wilson and Cathey. [App. I:15-32]. The motion was denied by an order dated October 9, 1997. [Case Register: Event Nos. 738; 749; App I:33].

At trial, Appellant offered, as offers of proof, denied by the court, the following statements in evidence for purposes of impeaching the surrogate transcript prior testimony of Mark Wilson and Donald Ross Cathey:

A. **Affidavit of Deborah L. Tuthill**, recounting an interview of co- defendant Cathey by her at Oregon State Penitentiary on June 19, 1991. Ms. Tuthill averred that during that interview, Mr. Cathey told her that he does not know specifically who planned the Leora Waite burglary; that it may have been his idea originally, but that he genuinely did not recall. Ms. Tuthill further averred that Mr. Cathey was sure that he had no intention of killing Ms. Waite; rather his intention was to knock her out. Mr. Cathey also said, according to Ms. Tuthill's affidavit, that after it was deemed unrealistic to continue with the Waite burglary, it was mutually agreed that the group (Messrs. Guzek, Wilson and Cathey) would go to Houser house. Mr. Cathey reportedly told Ms. Tuthill that there was no ring leader or any one person in charge; rather the activity was mutual. Ms. Tuthill's affidavit further recited that Mr.

Cathey told her that there had been no plan or prearrangement to kill the Housers and that their intention was to rob the house. Mr. Cathey reportedly told Ms. Tuthill that Randy Guzek at no time told Mark Wilson to "Do it!", but rather the shooting "just started." Mr. Cathey added, according to Ms. Tuthill, that from his vantage point, he could see Mrs. Houser at the top of the stairway seconds before the shooting began. " [Case Register, Event Nos. 838, 839].

B. **Memorandum of Defense Investigator David Rogers**, dated August 20, 1997, recounting several conversations he had with Mark Wilson at the Oregon State Penitentiary. According to Mr. Rogers' memorandum, Mr. Wilson told him the following: Wilson and the Appellant began committing burglaries while they were still in high school. They began using methamphetamine, and that usage escalated. Wilson was a good student who began dozing off in class due to methamphetamine use. Wilson had been a cadet at the police department. He eventually experienced a deterioration of his body. Wilson and Appellant's first burglary was of a residence in which they had previously attended a party. While there, they observed coins. They returned later and stole the coins. Joel Guzek, Appellant' father, assisted them with that burglary. Mark and Randy committed many burglaries. Neither of them was the leader, there was no leader. Proceeds of the burglaries went to Appellant's father. Appellant and Wilson began carrying guns, but Wilson did not know why they did so. Regarding the Housers, there was not any plan to kill them, and Wilson cannot recall if Appellant really said "Do it!" regarding the shooting of Rod Houser at his front door. [*Id.*]

C. **Deposition of Mark James Wilson**. On April 16, 1993, in the Marion County Circuit Court Case Mark James Wilson, Petitioner v. Manfred Maass, Superintendent, Oregon State Penitentiary, Defendant; No. 91-C10468. In the deposition, Wilson made numerous comments concerning the Houser homicides. Among the statements, were assertions that Wilson did not recall shooting anybody twenty times. He remembered pulling the trigger once outside the house and once inside the house. He did not remember what his state of mind was at the time of the homicides. He was really bothered because he lacked any idea of what was going through his mind at the time of the homicides. He did not specifically know that the gun (used to shoot Rod Houser) was loaded. He had a gun every time they (presumably meaning Wilson and Appellant) committed burglaries. Wilson did not think he ever thought about using the guns during the burglaries. He does not know what his frame of mind was as far as the murder [sic] committed that night. He believed he was mislead by his trial attorneys, and that if he had known the Parole Board would deny him parole forever, rather than his being definitely released at age 58, he may not have entered into the plea bargain and instead have gone to trial or accepted a death sentence. [Deposition of Wilson, at 8-10, 40-42; Case Register: Event Nos. 838, 839].

D. **The live testimony of Rachel Prudence Elaine Carlson**. Ms. Carlson was an inmate at the Oregon Women's Correctional Center (OWCC). While there, she met Mark Wilson. Ms. Carlson was a legal assistant at OWCC at the same time Wilson was a legal assistant at Oregon State Penitentiary (OSP) which is located directly behind OWCC. They met through daily phone calls and

letters. Ms. Carlson did not know Wilson prior to her incarceration.

Eventually, Carlson and Wilson's legal/business relationship evolved into a "social" relationship. They began writing as "pen pals," writing back and forth to each other on a personal level. The telephone calls became more "friendly."

Shortly after Memorial Day, 1997, during one of their telephone calls, Ms. Carlson discussed with Wilson what she had heard about the instant cause, whereupon Wilson characterized her statements as "vicious rumors." Wilson then wrote her a letter about the crimes.

In their first phone call discussing the crime, Wilson became very angry, swearing a lot. He was unhappy with Carlson for listening to anyone about the case. Wilson's follow-up letter was more detailed as far as information about the crime.

Wilson said it was a "burglary that had gone bad." Wilson wrote to Carlson that he had not killed two people, but only one; he gave a brief history of his methamphetamine use starting in January, 1987, through February when he got suspended from school for "doing lines" in the back of his English class, through April when he said he "packed some kind of gun." He further related that graduation was on June 5, and on June 28, he and Appellant had spent the weekend getting high and "using crank," had gotten bored, and decided to do a burglary. He went onto state that he had killed a man during the burglary. Wilson wrote that the people ended up being home, the burglars panicked and two people were killed. Prison officials were disturbed by the letter to Ms. Carlson and interviewed her about it. The letter itself was offered as Defense Exhibit No. 347.

(10/27/97, Tr. 60-67).

E. **Testimony of Lynn Fredrickson**, Lead Detective investigating the Houser homicides. The Fredrickson offer of proof concerned defense exhibit 348, a report by Fredrickson prepared November 6, 1987, with an appended school record.

(10/27/97, Tr. 81-82).

F. **Testimony of Defense Investigator David Rogers**. Mr. Rogers had reviewed defense exhibit number 347, ante, specifically a reference in that letter from Wilson to Carlson, regarding a meeting between Wilson and prior defense counsel for Appellant. Rogers testified that he was present at the meeting, in which Wilson indicated that he was inclined to testify on behalf of Appellant.

(10/27/97; Tr. 82-84).

G. **A representation by Appellant's trial counsel** that in a conversation with Wilson's lawyer concerning whether or not Wilson would testify in this trial, that Wilson's counsel advised Appellant's counsel that Wilson did want to assist in any he could, but was going to rely on the advice of his attorney. Secondly, that any conversation between Prosecutor Marquis and Wilson's counsel, discussions were had causing Wilson's counsel to conclude that Prosecutor Marquis was saying that if Wilson testified, and did so differently that he did in the first trial of this cause, that would be grounds to vitiate the (life saving to Mr. Wilson) plea agreement.

(10/27/97; Tr. 84-85).

H. **Testimony of Stephanie Dawn Wilson**, wife of Mark Wilson for four years. Mrs. Wilson met Mark Wilson twice before the crimes were committed, in the company of Appellant. She started correspondence with Wilson in

January, 1993. Wilson had discussed the circumstances surrounding his aggravated murder conviction with her several times. Wilson told her that he, Appellant and Cathey had been out committing burglaries and, at one point, ended up at the Housers, where they had gone to commit a burglary, expecting no one to be home, but resulting in the murders. He never told her of any intent among the three of them to kill anyone when they went to the Houser resident. Wilson told his wife that the three of them did not discuss killing the Housers specifically, or any one else specifically. He had been consistent in this story. Wilson also told his wife that he had declined to testify in Appellant's current proceeding, invoking his Fifth Amendment privilege under the advise of his attorney, "because he was not certain that they would not revoke his plea agreement and seek the death penalty against him in a future proceeding."

(10/27/97; Tr. 99-101).

On August 20, 1997, Appellant filed a *Notice of Intent to Rely on Evidence of Alibi as Mitigating Evidence* (Case Register: Event No. 645). The notice recited specific evidence Appellant wished to offer, which Appellant asks this Court to consider as constituting an offer of proof:

I. **The prior court testimony of Clarence Guzek** (Appellant's grandfather), since deceased, offered to prove that on June 28, 1987, from approximately 9:00 p.m. until June 29, 1987, at approximately 2:00 a.m. Appellant was in the presence of and at the home of Clarence Guzek on Walnut Street in Redmond, Oregon.

J. **The testimony of Kathleen Guzek** (Appellant's mother), offer to prove that on June 29, 1987, she noted that at 2:16 a.m. Appellant asked her to set the alarm clock as he had to get up early for work the next day. The

location of this conversation was at Kathleen Guzek's residence on Walnut Street, in Redmond, Oregon. She further would testify that when the alarm awoke her at 4:20 a.m. on June 29, 1987, she woke the Appellant, who was sleeping on a loveseat on the deck of her house.

In support of the foregoing offers of proof, in addition to other grounds, Appellant relied upon his *Memorandum in Support of Admissibility of Mitigating Evidence*, referenced numerous times in the Case Register and recited passim; See, for example, 10/27/97 Tr. 104)(App. H:9-14; Case Register: Event Nos. 833, 892, 873, 884).[1]

The state introduced the plea petitions of Wilson and Cathey as evidence for the jury's consideration. (10/27/97, Tr. 13; State's Exhibits 140, 169, 10/8/97 Tr. 16; App I:21-32). Page 4, subsection (5) of Wilson's plea agreement stated: "In

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[1] MR. McCABE: Just so the record is clear, I would assert the same grounds in my memorandum. I'm assuming the court is considering the grounds that I've raised -

THE COURT: You bet, I've got it right in front of me in three copies.

MR. McCABE: And it's probably not necessary to put another copy into the record, I would assume?

THE COURT: I wouldn't think so. I think the record, I'm not an appellate court, I don't know what they'll think of this record, but I think, at least for my purposes, its sufficient.

MR. McCABE: Okay, so I have, and I do rely on all those cases cited in my memorandum in support of admissibility of mitigating evidence.

THE COURT: So noted. * * *

THE COURT: Okay, that concludes this offer of proof.

addition, I will be subponaed to testify at any trial of both persons mentioned above, Mr. Guzek being one of them." Subsection (6) stated "If I do not testify truthfully in any trial referred to in (5) above, the State of Oregon and Judge Edmonds will no longer be bound by their previous promises made." (*Id.*; 10/27/97 Tr. 28).

The trial court found that Wilson and Cathey were unavailable to testify, and allowed their testimony to be presented through surrogates, denying Appellant's motion to exclude such testimony by transcript, and to strike same. (10/7/97 Tr. 29).

The trial court ruled inadmissible all of Appellant's offers of proof recited above. (10/27/97, Tr. 14, 78, 79, 80, 82, 85, 103).

The bulk of co-defendants' testimony was summarized in Appellant's brief filed in October, 1989, in his original direct review proceeding. It was also summarized in Assignment of Error No. 10 of his opening brief in *Guzek II*. The version of the homicidal events offered by Wilson and Cathey may be briefly summarized as follows:

> Mark Wilson met Appellant at Redmond High School in November, 1986, and they became good friends. Wilson was a frequent house guest at the Guzek residence on Jackson Street in Redmond and kept a toothbrush and razor there. Appellant and Wilson both worked at Pozzi Windows and frequently rode together. Defendant and Wilson met Donald Ross Cathey on June 5, 1987, through another friend, Willie Stevens. Cathey came to the area from California to visit Stevens around the first part of June, 1987. Appellant, Wilson and Cathey were acquaintances and sometimes did things together.
>
> Wilson related that Appellant's father, Joel Guzek, and his girlfriend, Jill Armstrong, had a plan to steal jewelry from

an elderly lady by the name of Mrs. Whaite as one of the last illegal things they did before leaving town. Joel estimated that Mrs. Whaite had approximately $10,000 worth of diamond rings. Wilson got Mrs. Waite address by impersonating an Eagle Crest timeshare salesman and asking to send her some literature. Appellant and Wilson drove to the area and attempted to find the house. Wilson consulted an encyclopedia and called several chemical companies to find out about chemicals that would knock a person out.

Appellant, Wilson and Cathey spent June 28, 1987, together swimming and riding Wilson's quadrunner at "The Cove" and Climb Falls. Robin Martin saw the three at Climb Falls and estimated that they left between five and six p.m. Appellant left before Wilson and Cathey did to go see a girlfriend. Wilson and Cathey drove to Crooked River Ranch, then drove down Lower Bridge Road following two attractive young ladies in a Mini Blazer with jet skis. On the way, Cathey saw a house on a hill and said "this looks like a nice house to hit", meaning burglarize. Wilson explained that it was Anne Houser's aunt and uncle's house. Wilson dropped Cathey off in Redmond and returned to his home in Crooked River Ranch.

Wilson returned to Appellant's resident on Jackson Street later that same evening. Appellant decided to get Mrs. Waite's rings for his father. Appellant discussed the plan to burglarize the Waite residence with Cathey and Cathey was "all for it." Wilson and Cathey drove to Crooked River Ranch to steal a headlight switch for Wilson's truck, but a security patrol passed by and Wilson instead went home and borrowed his mother's truck. Donna Wilson saw her son Mark and Cathey as they returned the quad

runner and left in her truck about 11:45 p.m. Wilson and Cathey returned to Appellant's residence in Redmond.

After heading out, the three stopped at the Safeway parking lot in Redmond and each snorted one line of crank. They then proceeded toward Bend to carry out the Whaite plan. Cathey and Wilson were to go up to the door and say they were having car trouble and Cathey was to stab Mrs. Whaite with a pocket knife Appellant had given him. Appellant was to act as look out and to help remove valuables after everything was clear. The entire plan was scrapped because there were too many lights on and too many cars in the Whaite's driveway that night. Cathey also said he backed out when they got to the house.

Mark Wilson described the next sequence of events as follows:

"Q [Prosecutor]: Then where did you go after you went past her residence?

A [Wilson]: Well, we headed back up the hill because she lived down next to the river, so we headed up the hill again and headed towards Redmond.

* * * * *

Q: Was there any discussion as to what you were then going to do?

A: At that time we all decided basically that we were, we would like to hit a house, burglarize a house. And we were trying to figure some place to burglarize.

Q: Did you eventually decide on a place to burglarize?

A: Yes, we did. That would have been the Houser residence.

Q: How did you arrive at the decision to, to go to the Houser residence?

A: I believe Ross Cathey brought up the fact as 'what about that house we saw today, Anne Houser's aunt and uncle's ' and, we all thought that would be okay with us to go. I guess that's what we decided on."

The trio returned to the Guzek residence on Jackson Street and Appellant procured a .22 rifle and .32 pistol from the house. They headed for the Houser residence and along the way Appellant stopped to show Wilson how to un-jam the rifle and fired several shots. Appellant and Wilson told Cathey that if anyone was home at the Houser residence they would go in and "get them down." All three went up to door upon arrival. Appellant knocked several times. Rod Houser answered the door in his robe and asked what they wanted. Appellant made up a story about prank phone calls from Anne Houser and Rod started getting irate. At that point, Appellant turned to Wilson and yelled "do it" and Wilson immediately raised the rifle and started firing. Wilson continued to fire at Rod Houser as Rod backed into his house and eventually fell down in front of the front room fireplace. Wilson did not recall how many shots were fired or even that he emptied the clip, but he appeared to fire until the rifle ran out of bullets.

As Wilson was shooting Rod Houser, Appellant ran up the stairs after Lois Houser and three shots were heard by Wilson and Cathey to come from upstairs. Cathey told Wilson "let's make it look like a cult killing." Cathey stabbed Rod Houser in the throat with a pocket knife Appellant had given him earlier that night. Cathey also put a white Bible on top of Rod Houser's body. Wilson and Cathey observed Appellant rummaging through property upstairs and were told by Appellant that he found a .357 magnum in a closet and that he assumed Lois was going for it when he "hit" her there. Appellant also said he placed a knife in Lois Houser's outstretched hand.

Appellant told Cathey and Wilson to listen for cars and to check downstairs for items of value to take. All three removed property from the residence and stacked it in Donna Wilson's pickup. All three wore gloves. The pickup was 1/2 to 3/4 full with Houser property. The trio left but returned shortly thereafter to retrieve empty shell casings left in the residence. They drove to Ferguson's Market in Terrebonne where Appellant called his father to come and meet them. Joel Guzek and Jill Armstrong arrived a short time later and most of the Houser property was loaded into their Volkswagen Jetta. Appellant told his father the property came from a drug deal gone bad and Wilson and Cathey went along with the story.

Wilson and Cathey each received some money from Appellant, but neither got any of the Houser property. Appellant told Wilson at work later that he (Appellant) had shot Lois Houser in three vital areas. Appellant and Wilson accompanied Joel Guzek and Jill Armstrong to Reno for the fourth of July weekend. Along the way Joel asked Appellant if they thought it was really worth it. Appellant got a big grin on his face and said "yes it was."

At one point after their arrests, Appellant and Cathey were housed in adjacent cells in Deschutes County Jail. Appellant passed a note to Cathey through a hold in the cell wall requesting Cathey to write a note saying that Appellant had nothing to do with the homicides. Cathey and Wilson both reached life-saving plea agreements with the prosecutor and agreed to testify against Appellant. Wilson and Cathey both testified that Appellant killed Lois Houser.

(10/8/97 Tr. 18-85; 10/14/97 Tr. 196-259; 10/15/97 Tr. 30-141).

Relevant Statutory and Constitutional Provisions

Former ORS 163.150(5)(d), now codifiifed as ORS 138.012(b), states, in relevant part:

> ". . . A transcript of all testimony and all exhibits and other evidence properly admitted in the prior trial and sentencing proceedings are admissible in the new sentencing proceeding. Either party may recall any witness who testified at the prior trial or sentencing proceeding and may present additional relevant evidence."

OEC 802 provides:

> "Hearsay is not admissible except as provided by Rules 801-806 (ORS 40.450 to ORS 40.475) or as provided by law."

OEC 803(a) provides:

> "(3) **Hearsay exceptions**. The following are not excluded by Rule 802 (ORS 40.455) if the declarant is unavailable as a witness:
>
> (a) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding . . . if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or re-direct examination."

OEC 804(1) [ORS 40.465(1)] defines "Unavailability as a witness" to include situations in which the declarant:

> "(a) Is exempted by ruling of the court on the ground of privilege from tesitfying concerning the subject matter of the statement;
>
> (b) Persists in refusing to testify concerning the subject matter of a statement despite an order of the court to do so;
>
> (c) Testifies to lack of memory of the subject matter of the statements;

(d) Is unable to be present or to testify at the hearing because of death or then existing mental illness or infirmity; or

(e) Is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of an exception under paragraph (b)(c) or (d) of subsection (3) of this section, the declarant's attendance or testimony) by process or other reasonable means."

OEC 806 provides:

"**Attaching and Supporting Credibility of Declarant.** When a hearsay statement, or a statement defined in ORS 40.450(4)(b)(C), (D) or (E) [Rule 801(4)(b)(C), (D), or (E)], has been admitted into evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the hearsay statement of the declarant, is not subject to any requirement under ORS 40.380 [Rule 613] relating to impeachment by evidence of inconsistent statements. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination."

The Legislative Conference Commentary to Rule 806, states in relative part:

"Oregon Rule of Evidence 806 prescribes the manner and limits of impeaching, rehabilitating and cross-examining a hearsay declarant. The rule is based on Rule 806 of the Federal Rules of Evidence. Its reference to ORE 613 replaces a federal reference to the opportunity to deny or

explain, and was made necessary by the specific retention of Oregon practice on inconsistent statements in that rule.

Impeachment of absent hearsay declarant. The declarant of a hearsay statement that is admitted into evidence is in effect a witness. Therefore, in fairness, the declarant's credibility should be subject to impeachment (and to rehabilitation) as if the declarant had in fact testified. See Rules 608 to 609-1. There are problems in doing this, however. These arise from the factual differences between hearsay and live witnesses, and between kinds of hearsay, and principly involve the foundational requirement for impeachment by inconsistent statement.

An inconsistent statement of a live witness is inevitably a prior statement, which may be called to the witness' attention in accordance with ORE 613 a statement that is inconsistent with hearsay may be subsequent to it, and cannot be called to the declarant's attention. If the court insists on the usual rules for impeachment by inconsistent statements in a hearsay situation, it must deny the opponent, who is already barred from cross-examination, any benefit of this important technique. The writers favor allowing the inconsistent statement. McCormick, Evidence section 37 at 74 (2nd Ed. 1972); 3 Wigmore, Evidence section 1033 (3d Ed. 1940). The cases, however, are divided. Compare People v. Collup, 27 Cal.2d 829, 167 P2d 714 (1946); People v. Rosoto, 58 Cal.2d 304, 23 Cal.Rptr. 779, 373 P2d 867 (1962); Carver v. United States, 164 US 694, 17 S.Ct. 228, 41 L.Ed. 602 (1897) (allowing impeachment), with Mattox v. United States, 156 US 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895); People v. Heinz, 284 NY 93, 29 NE 2d 483 (1940) (disallowing impeachment).

When the inconsistent statement was made after the hearsay statement, the kind of hearsay involved seems unimportant. The opponent may not have been totally deprived of cross-examination when the hearsay is former testimony, ORE 804(3)(a), but the opponent still was deprived of cross-examination along lines suggested by the trial.

* * * * *

For these reasons, the Legislative Assembly dispensed with the foundation requirement in all hearsay situations, leaving a rule which is readily administered and fair.

* * *

The above matters had not been addressed in Oregon statute or case law. Federal Ninth Circuit law is in accord, however. McConney v. United States, 421 F.2d 248, 251 (9th Cir. 1969); See also: Carver v. United States, *supra*."

Article I, Section 11 of the Oregon Constitution provides in relevant part:

"In all criminal prosecutions the accused shall have the right . . . to meet the witnesses face to face . . . "

The Sixth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides that:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . "

ARGUMENT

Standard of Review

This Court reviews the trial court's admission or exclusion of evidence for errors of law. *State v. Pinnell*, 311 Or 98, 109

n. 17 (1991). This Court reviews constitutional issues for errors of law.

Discussion

Because of the close interrelation of the questions presented, Appellant combines his arguments on Assignments of Error Nos. 16, 17, 18, and 19. In *Oregon Evidence*, pp. 521-522 (Butterworth Legal Publishers Second Edition), Laird C. Kirkpatrick discusses the relationship between hearsay and the Confrontation Clause:

> "The hearsay rule and the Confrontation Clause are not co-extensive. Evidence may be admissible under the confrontation clause, yet be inadmissible under the hearsay rule. Conversly, evidence may be admissible as an exception to the hearsay rule under state evidence law, yet be inadmissible under a confrontation clause. *See, Pointer v. Texas*, 380 US 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). . . . If the hearsay declarant does not testify at trial and the out-of-court statement is admitted as an hearsay exception, whether or not the Confrontation Clause depends on whether there is a satisfactory basis for the trier of fact to evaluate the truth of the prior statement and whether the statement possesses sufficient 'indicia of reliability.' *Dutton v. Evans*, 400 US 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970).
>
> As the Supreme Court stated in *Ohio v. Roberts*, 448 US 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980):
>
> The Court has applied this "indicia of reliability" requirement principally by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the "substance of the constitutional protection." . . . This reflects the truism that 'hearsay rules and the Confrontation Clause are generally designed to protect

similar values," *Califomia v. Green*, 399 US at 155,' stem from the same roots. *Dutton v. Evans*, 400 US 74, 86 (1970). It also responds to the need for certainty in the work a day world of conducting criminal trials.

In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then though, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.'

As the quoted statement indicates, if the declarant is shown to be unavailable and the statement satisfies a 'firmly rooted' exception to the hearsay rule, compliance with the Confrontation Clause is almost certain to be found. If no showing is made of the unavailability of declarant . . . or if the hearsay exception is not 'firmly rooted' there is greater uncertainty regarding whether the Confrontation Clause is satisfied."

On Page 523, Kirkpatrick compares the state and federal confrontation provisions and states that:

"To date the Oregon Supreme Court has tended to adopt the precedents of the United States Supreme Court 'in determining what constitutes unavailability of a hearsay declarant and what constitutes adequate indicia of reliability of hearsay declarations to satisfy our state constitutional confrontation clause.' *State v. Campbell*, 299 Or 633, 648, 705 P2d 694, 703 (1985)."

The United States Supreme Court has recently ruled that statements of co- defendants, against their own penal interest, which inculpate the defendant on trial, may not be admitted

against the defendant on trial if that defendant has no opportunity to cross-examine; doing so would violate the federal Confrontation Clause, because statements against penal interest are not "firmly rooted" and are inherently suspect. *Lilly v. Virginia*, 527 US 116, 119 S.Ct. 1887, 144 LEd2d 117 (1999). *See also*: *Gray v. Maryland*, 523 US 185, 118 S.Ct. 1151, 140 LEd2d 294 (1998).

Nonetheless, Appellant urges this Court to re-examine the issue, both because Appellant believes that ORS 138.012(2)(b) on its face by permitting the state to substitute surrogate testimony by transcript, is unconstitutional; additionally, Appellant contends that doing so in this case Violated his state and federal constitutional rights.

ORS 138.012(2)(b) on its face, permits the state to substitute the surrogate testimony by transcript of the co-defendants from Appellant's first trial in lieu of live testimony, and the statute facially allowed this to occur in lieu of the state producing the witness in the courtroom to show unavailability, and without requiring the state to show that the Appellant "had an opportunity and similar motive to develop the testimony by direct, cross, or re-direct examination." Here, both Wilson and Cathey were produced (Wilson by telephone). Cathey was adamant he would not testify under any circumstances. Wilson invoked his Fifth Amendment privilege against self-incrimination, because, as explained by his attorney, he had a federal habeas corpus proceeding pending. The trial judge, however, did not explicitly order Wilson and Cathey to testify.

It is Appellant's position that ORS 138.012(2)(b) as it was applied in this trial, is in conflict with the hearsay rules of the Oregon Evidence Code and violates the state and federal provisions concerning the use of former testimony as an exception to the hearsay rule, thereby also violating the state and federal Confrontation Clauses. No former testimony

should have been presented in Appellant's trial, notwithstanding the real or purported "unavailability" of the witnesses.

The hearsay exception to the admissibility of former testimony permits the admission of former testimony only in those situations where the parties at the prior proceeding had a "similar motive" to examine the witnesses as they would if the witness was produced life at the current proceeding. ORS 138.012(2)(b), violates the state and federal Confrontation Clauses unless it is rooted in a well-recognized hearsay exception. The state cannot demonstrate that any former testimony fell inside a firmly rooted exception to the hearsay rule, by virtue of *Lilly v. Virginia, supra*. The state, in order to do so, would have to demonstrate that the parties at Appellant's first trial had "similar motives" to examine the witnesses, as they would have at the trial in the present hearing.

ORS 163.150 provides the sentencing scheme in a death penalty case. Appellant was first tried in 1988. The testimony of the witnesses the state offered through a surrogate was transcribed in 1988. At the time of Appellant's 1988 trial, the jurors sitting in the sentencing hearing deciding whether or not death should be imposed on a person convicted of aggravated murder had to resolve only three issues: (1) Did the defendant deliberate; (2) Would the defendant be dangerous in the future; and (3) Was the defendant's conduct in the killing of the deceased unreasonable in response to provocation, if any provocation existed. The statute permitted the jury to consider mitigating evidence, but only with regard to the three questions. In fact, the statute itself limited mitigation to only the future dangerousness question. The scheme did not permit a jury to vote against a sentence of death on the basis of mitigating evidence, if the mitigating evidence did not apply to the three questions set out in former

ORS 163.150(b), or by the statute's terms to the second question only.

In *State v. Wagner*, 305 Or 115 (1988), ("*Wagner I*") the Oregon Supreme Court held that Oregon's death penalty scheme was constitutional. The defendant in *Wagner I*, like the Appellant in this case, contended that the scheme violated the United States Constitution because the jury was not presented with the issue of mitigation as a basis for a life sentence if the mitigation did not relate to the three death questions. The Oregon Supreme Court held that no fourth question presenting such consideration was permitted under the statute. As a result of the holdings of the Oregon Supreme Court and the judge at Appellant's first trial, there was no issue before the jury that sentenced Appellant the first time concerning mitigating evidence that did not relate to the three death questions.

In 1989, the United States Supreme Court decided *Penry v. Lynaugh*, 492 US 302 (1989). *Penry* concerned a Texas case. In 1988, the death penalty statutes in Texas and Oregon were almost identical. *Penry* held that the Texas trial court erred when it limited the mitigating evidence a jury could hear only to evidence that was relevant to the resolution of the three death questions. The United States Supreme Court held that the Eighth Amendment to the United States Constitution was violated when the jury was prevented from using mitigating evidence when it had to do with the issues other than those presented in the three death questions, in deciding whether the death penalty should be imposed. As a result of *Penry*, Oregon's death penalty statute was legislatively and judicially amended. A "fourth question" has been added to the statutory scheme. That question asks jurors to decide whether a death sentence should be imposed. The amended statute tells jurors that, in determining that issue, they are to answer the question "no" if, considering any aspect of the defendant's

character or background, or any circumstances of the offense, and considering victim impact evidence and any aggravating evidence, that a sentence of less than death would be appropriate.

In *United States v. Powell*, 894 F2d 895 (7th Cir.1990), Defendant Powell argued that the trial court had committed error when it excluded the transcript of the guilty plea hearing testimony of a witness whom the defense wished to call, who invoked the Fifth Amendment privilege against self-incrimination at the defendant's trial. In holding that the trial court had not committed error, the Seventh Circuit explained that the witness was unavailable within the meaning of Rule 804 of the Federal Rules of Evidence. The court then pointed out that in order to have the transcript of the prior testimony admitted under the Federal Rules of Evidence involving the hearsay exception for former testimony, FRE 804(b)(1), which is identical to OEC 804(b)(1), it was necessary to show that the prosecutor had a similar motive to interrogate the witness at the guilty plea hearing as he would have had at the defendant's trial. The Seventh Circuit rejected the defendant's contention that the prosecution had a similar motive, stating:

> ". . . The prosecution's motive at a guilty plea hearing is to assure that the plea is voluntary and that a factual basis exists for it . . . This responsibility, moreover, rests primarily with the trial judge . . . Here, although Heet denied it at his guilty plea hearing that he conspired with Powell and Saudy, he admitted to conspiring with others in committing the offenses in Counts One and Two of the Indictment. Thus, the government did have incentive to pursue the issue of Powell's involvement." *Id.*, at 901.

In the case at bar, the Oregon Supreme Court had held in *Wagner I, supra*, that Oregon's statute did not contain a fourth question that would present an issue to the jury concerning mitigating circumstances that did not bear on the three death

questions in the 1988 statute. It is this very failure of the 1988 statute to contain a "fourth question" that resulted in the reversal of Appellant's death sentence by the Oregon Supreme Court. *Guzek I*, 310 Or 299 (1990). As in *Powell*, Appellant's attorneys would not have had any incentive to introduce mitigating evidence that did not bear on the three death questions when they examined the witnesses in Appellant's first trial. In fact, in 1988, such evidence would have irrelevant to any of the issues before the jury and could have conceivably been subject to a proper objection or mistrial motion.

This Court has explained that " 'Opportunity' in the context of OEC 804(3)(a) refers to the legal or practical hurdles that would impede the examiner if the examiner were motivated to develop it, *e.g.*, witness asserted a privilege to prevent cross- examination or impeaching documents were not available." *State v. Pinnell*, 311 Or 98, 116 n.27 (1991). In Appellant's case, the opinion of this Court in *Pinnell*, would provide a legal barrier to inquiries concerning mitigating evidence that was not relevant to the three statutory death issues in effect at Appellant's first trial. In *Pinnell, supra*, 311 Or at 166 n. 28, this Court stated that " 'motive,' in the context of OEC 804(3)(a), refers to those tactical and strategic considerations that might reasonably influence the direction and extent of counsel's development of the testimony." Similarly, Appellant's attorney's knowledge - that the Oregon Supreme Court, on February 26, 1988 (while Appellant's first trial was underway)[2] had held that there was no provision in the Oregon death penalty statute for a jury to decide against imposing a death sentence because of mitigating factors not related to the three statutory questions - would influence the

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[2] Appellant's verdict of guilty on all nine counts was returned on March 3, 1988 [Case Register: Event No. 168].

attorney's strategy and tactics. The attorney would not ask questions which he knew related to irrelevant issues because he would expect objections by the prosecution to be sustained and because of ethical duties to avoid attempting to introduce improper evidence into a legal proceeding.

In any event, the death penalty scheme, as it existed in 1988, provided no motive for Appellant to inquire of any of the witnesses (Wilson, Cathey) with regard to any general mitigating circumstances.

Dayton Leroy Rogers was charged in one indictment with the murder of decedent Smith. In another indictment, he was charged with the murder of six other women. Rogers was tried first for the murder of Smith. He was found guilty of aggravated murder, but the jury answered "no" to the question "Is there a probability that the defendant, Dayton Leroy Rogers, would commit criminal acts of violence that would constitute a continuing threat to society?" As a result, Rogers did not receive the death penalty for the murder of Smith.

Prior to his trial for the murder of the six women, Rogers filed a motion to declare him ineligible for the death penalty on the grounds that the jury's verdict of "no" in the Smith murder trial precluded the state from re-litigating the issue of his future dangerousness in the trial for the murders of the six women. This Court rejected Rogers' argument because:

> "The issue presented by the second question in the present case differs from the second-question issue in the Smith case, because the sentencing jury in each case had to determine whether, based on everything in defendant's life to that point in time (including 'the extent of the mental and emotional pressure under which the defendant was acting at the time the killing was commited') defendant likely would be dangerous in the future . . . The trial in the present case took place nearly one year after

> the Smith homicide trial. Because everything that has occurred in a defendant's life may be relevant to a determination of that defendant's future dangerousness, the second-question determination necessarily incorporates a temporal element. The jury must determine a defendant's future dangerousness from the day on which the jury makes its determination forward, based on the defendant's life from that day backward. The year of defendant's life between the two trials and defendant's subsequent conviction in the guilt phase of this case had not yet occurred at the time the Smith homicide jury rendered its verdict." *State v. Rogers*, 313 Or 356 , 376-77 (1992) (*Rogers II*).

The holding in *Rogers II* affects Appellant's case. Appellant did not have an opportunity or motive to examine the witnesses at his first trial concerning matters that occurred after the first trial, because those events had not yet occurred. Because Appellant was deprived of this opportunity, the former testimony exception to the hearsay rule does not apply and the transcripts were not admissible under OEC 804. Since the hearsay exception did not permit the admission of the surrogate transcript testimony, both the Oregon and federal Confrontation Clauses were violated because the challenged statements would not satisfy a "firmly rooted" exception to the hearsay rule.

In *State v. Herrera*, 268 Or 349 (1979), this Court reversed a murder conviction for violation of a defendant's confrontation rights.

In *Herrera*, the trial court had allowed into evidence before the jury preliminary hearing testimony of a prosecution witness who testified under immunity, then claimed privilege against self-incrimination at trial when the state broke its promise. The state claimed on appeal that the witness was

unavailable and that, therefore, the prior testimony could be introduced. The Supreme Court disagreed stating:

> "The confrontation clause, while guaranteeing the defendant the right to confront a witness face-to-face is not without exception. One such exception under which prior recorded testimony which was subject to cross-examination may be introduced into evidence at trial exists when a witness is truly unavailable to testify at trial * * * However, because of the defendant's strong interest in confronting his accusers and the prosecutor's duty to provide a fair trial for the defendant and to protect the defendant's constitutional rights, the prosecutor's invocation of this exception cannot be granted routinely.
>
> "Before a prosecutor can use prior recorded testimony and thus deprive a defendant of his right at trial to confront his accusers face-to-face, he must first show the trial court that the use of the former testimony is a genuine necessity [* * *] The burden is on the prosecutor to show the trial court what circumstances exist which make use of the prior recorded testimony necessary." State v. Herrera, 286 Or at 355.

This Court in *Herrera* stated the vital interests protected by the right of confrontation. The first vital interest was described as:

> "The right of confrontation protects two vital interests of the defendant. First, it guarantees that the defendant has an opportunity to cross- examine the witness against him in order to test his sincerity, memory, ability to perceive and relate, and the factual basis of his statements. This purpose of confrontation helps to assure the accuracy of the result of the jurors' -determining process by giving the accused an opportunity to test the recollection and

conscience of a witness. *Barber v. Page*, 390 US 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968)." *Herrera*, at 353.

In Appellant's case, he had the opportunity to cross-examine the witnesses in the guilt phase and the first penalty phase. However, this Court in *Herrera*, held that the right of confrontation protects a second vital interest which, as in the case of Appellant Herrera was violated for Appellant Guzek by admission of the surrogate transcript testimony:

> "The second interest of the defendant which the right to confrontation protects is enabling the defendant to demonstrate to the jury the witness' demeanor when confronted by the defendant so that the credibility of the witness is displayed in the courtroom. This second purpose is no less important than the first." *Id.*, at 354.

This Court cited with approval its holding in *State v. Smyth*, 286 Or 293 (1979):

> "In our system of justice a defendant is not tried on a dossiea compiled in prior hearings, no matter how thoroughly and judicially conducted. His guilt must be established at the trial by evidence that convinces a fact-finder beyond a reasonable doubt. But the earlier opportunity to question the witness will often avail little when the jury at the trial sees neither the witness nor the effect of the cross-examination recorded in a cold transcript. As the United States Supreme Court stated in Barber, '[t]he right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weight the demeanor of the witness.' 390 US 725, * * * ."

ORS 138.012(2)(b) is facially unconstitutional by providing in relevant part that a "transcript of all testimony and all exhibits and other evidence properly admitted in the prior trial and sentencing proceeding shall be admissible in

the new sentencing proceeding . . . ." The language of that statute is flatly irreconcilable with Article I Section 11, the Sixth and Fourteenth Amendments, *State v. Herrera, supra*, and *Barber v. Page, supra*.

In *State v. Douglas*, 310 Or 438, 444-45 (1990) the Appellant assigned as error the admission of an "unavailable" witness' testimony, which had previously been recorded in that Appellant's preliminary hearing. This Court disagreed with Douglas' contention that the challenged testimony did not meet the requirements of OEC 804(3)(a) that there had been an "opportunity and similar motive to develop the testimony" in the preliminary hearing. This Court found that the security release hearing did meet those requirements.

In *Douglas*, this Court held that Appellant had the opportunity at the security release hearing to cross-examine the witness, and availed himself of it fully. This Court also found that Douglas had a similar motive to cross-examine the witness at the security witness hearing because the parties and the pending charge were identical in the two proceedings. Like the trial court, this Court noted the security release hearing focuses on the question of defendant's guilt. Because release in a murder case will be denied if "the proof is evident or the presumption strong that the person is guilty" (ORS 135.240(2); Or.Const., Art., I Section 14), this Court "presume[d] that defendant sought the hearing because he wanted to be released. That is, not only was the central issue of guilt essentially the same, but also defendant's motive in having that issue decided in his favor at the security release hearing was similar to his motive at trial." *Douglas, supra*, at 455.

In *State v. Moen*, 309 Or 45, 84-86 (1990), this Court held that a preliminary hearing provides an opportunity to cross-examine witnesses and suggest the same motive to do so that is similar to the motive at trial. Because of the opportunity to

cross- examine the witness at the preliminary or security release hearings, this Court further held that confrontation rights under the state and federal constitutions are not violated by admitting such testimony during the guilt phase of the proceedings. *State v. Douglas, supra*, 309 Or at 445-46; *State v. Moen, supra*, 309 Or at 86.

As aforestated, the elements of (1) opportunity to cross-examine and (2) motive to cross-examine witnesses Wilson and Cathey were not the same in Appellant's first trial, and his most recent penalty phase hearing on remand.

As noted in the recitation in the pertinent portions of record for these assignments of error, co-defendants Wilson and Cathey, after they had received their life-saving sentences in exchange for their testimony against Appellant in his first trial, made a number of statements which were inconsistent with their prior testimony. These statements concerned whether Appellant was a "ring leader" who had master-minded the murders of the Housers, and ordered the co-defendants to kill. Allowing the transcript testimony permitted the state to present a one-sided theory to the jury, which supported the contention that Appellant was such a manipulative, ring-leading mastermind. Appellant was unable to cross-examine Wilson and Cathey regarding their subsequent inconsistent statements in that regard.

OEC 806 and its commentary make clear that Appellant should have been permitted to meet those claims, made in the absence of Wilson and Cathey at his remand hearing, by impeaching them. The trial court compounded the violation of Appellant's confrontation rights by not allowing the exhibits and testimony offered by Appellant in that regard.

The trial court's failure to admit the subject exhibits and testimony violated a number of Appellant's rights. The evidence is relevant under OEC 401, and was entitled to be

presented to the jury pursuant to ORS 163.150(1)(a) because it was "matter . . . relevant to sentence * * * ."

The proferred evidence rebutted the state's assertion that Appellant was the "ring leader" of a homicidal gang. The evidence, therefore, was within that which concerns Appellant's character and background, under *Wagner II*, 309 Or 5.

Appellant made specific offers of proof concerning the evidence he wanted to introduce. Oregon jurisprudence provides that an offer of proof can be a recitation by counsel of what the witness would say, or testimony by the witness. *State v. Phillips*, 314 Or 460, 466, 840 P2d 666 (1992); *State v. Affeld*, 307 Or 125, 128, 764 P2d 220 (1988); *State v. Olmstead*, 310 Or 455, 461 (1990).

The trial court's error precluded Appellant from introducing evidence relevant to the appropriate sentence he should receive, contrary to ORS 163.150(1) and OEC 401.

The trial court's rulings also violated Appellant's rights to be heard and to present a defense under Article I, Section 11 of the Oregon Constitution and the Sixth and Fourteenth Amendments to the United States Constitution, as well as his rights to confront and cross-examine the witnesses against him under those same constitutional provisions, and denied him due process. In Appellant's first trial, co-defendants Wilson and Cathey provided the evidence which convicted him and led to his death sentence, in what would have otherwise have been an entirely circumstantial case. The fact that co-defendant Wilson had recanted his testimony, at least partially, with regard to whether Appellant's involvement in the crime was as a ringleader, was extremely relevant and was certainly a mitigating factor. At the very least, it was a subsequent inconsistent statement which would have been

very powerful in the impeachment of Wilson's and Cathey's surrogate testimony by transcript.

Allowing the surrogate testimony by transcript of Wilson, while excluding his subsequent inconsistent statements; was an inconsistent ruling. Wilson's statements were inconsistent with his previous testimony, and Wilson had been ruled unavailable as a witness by the trial court. The result of this one-sided set of evidentiary rulings was that the state was granted a non-reciprocal benefit to present unimpeached material testimony which was critical to the jury's determination as to whether Appellant should die.

This controvened the rule of *Wardius v. Oregon, supra*, in violation of the due process clause of the Fourteenth Amendment. Further, because Appellant could not have known in his first trial that Wilson would subsequently change his statements, the due process clause was violated for that reason also.

Appellant was, therefore, also denied a reliable adjudication of an appropriate sentence under the Eighth Amendment because the jury was not allowed to consider this evidence in deciding the punishment. *Jurek v.Texas*, 428 US 262, 271 (1976); *Turner v. Murray*, 476 US 28, 33-34 (1986).

Appellant here had "no opportunity to deny or explain" or even impeach the statements of Wilson and Cathey. He could not "appropriately create any other opportunity to meet what was not in the case," *State v. Tucker*, 315 Or 321, 353 [Fadely, J., dissenting, citing *Chambers Mississippi*, v. 410 US 284, 302-03 (1973)], when the court not only disallowed his offers of proof concerning Wilson and Cathey, but additionally denied Appellant the right to present alibi evidence to challenge the co- defendants' transcript testimony.

As the United States Supreme Court stated, in overturning the conviction in Chambers:

> "Few rights are more fundamental than that of an accused to put on a fence... where constitutional rights directly affecting the ascertainment of [outcome] are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice . . . exclusion of this critical evidence . . . denied . . . fundamental standards of due process . . . . and . . . deprived *Chambers* of a fair trial." Chambers, 410 US at 302-03.

As noted, ante, the plea agreements of Wilson and Cathey were admitted into evidence. Relevant paragraphs of those plea agreements recited that Wilson and Cathey were required thereunder to testify truthfully against Appellant, under the penalty of having their life-saving plea agreements revoked if they failed to do so. Although Wilson and Cathey refused to testify at Appellant's subsequent penalty hearings, the state has never sought to revoke those plea agreements. Nonetheless, their admission before the jury constituted reversable error.

In *State v. Charboneau*, this Court reversed convictions for aggravated murder and murder, where the only eye witness to the murder testified in detail as to Charboneau's personal participation in the murder, and the trial court allowed the state to introduce into evidence the plea agreement of the eye witness which recited the state's belief that the eye witness' representations accurately stated his involvement in the crime. *State v. Charboneau*, 323 Or at 42-43, 50, 913 P.2d 308 (1996).

In *State v. Wilson*, 323 Or 498, 918 P2d 826 (1996), Charboneau's co- defendant's convictions for aggravated murder and murder, of the same victim, were reversed for precisely the same reason.

In *Charboneau* and *Wilson*, this Court noted that the eyewitness whose plea agreement had been introduced by the state, was the only eyewitness to the murder who testified in detail as to the defendants' personal participation therein, thereby providing the crucial evidence that tied the defendants to the murder. Under those circumstances, this Court held the error was prejudicial, requiring reversal of the convictions.

This Court based its ruling on the proposition that a "witness' testimony or exhibit may not, explicitly and directly, contain an opinion as to a trial witness' credibility." Wilson, 323 Or at 502; Charboneau, 323 Or at 48.

Here, the plea agreements comment on Wilson's and Cathey's credibility was a reference to pre-testimonial polygraphs. Appellant urges that admitting into evidence a recitation that Wilson and Cathey must "testify truthfully" concerning Appellant's guilt, is tantamount to such a direct and explicit comment.

Appellant urges this Court to reach the merits on this issue on the grounds that it constitutes "plain error," which is "apparent on the face of the record." ORAP 5.45(2); see also, *State v. Brailey*, 224 Or 1, 9 (1960).

Accordingly, Appellant's rights under the Confrontation Clauses of the state and federal constitutions, and his right to be heard and to present critical evidence as part of a complete defense under Article I, Section 11 and the Due Process Clause, were violated. Therefore, his sentences of death should be vacated.

* * * * *

Supreme Court, U.S.
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No. 04-928

IN THE
Supreme Court of the United States

STATE OF OREGON,
Petitioner,

v.

RANDY LEE GUZEK,
Respondent.

On Writ of Certiorari to the
Supreme Court of Oregon

BRIEF OF THE STATES OF ALABAMA, ARIZONA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, IDAHO, KANSAS, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, OHIO, PENNSYLVANIA, SOUTH DAKOTA, TEXAS, UTAH, VIRGINIA, AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF PETITIONER

TROY KING
Attorney General

KEVIN C. NEWSOM
Solicitor General
Counsel of Record

STATE OF ALABAMA
11 South Union Street
Montgomery, AL 36130-0152
(334) 242-7300

July 22, 2005

ADDITIONAL COUNSEL

TERRY GODDARD
ATTORNEY GENERAL
STATE OF ARIZONA
1275 W. Washington St.
Phoenix, AZ 85007

JOHN W. SUTHERS
ATTORNEY GENERAL
STATE OF COLORADO
1525 Sherman Street
Denver, CO 80203

CHRISTOPHER L. MORANO
CHIEF STATE'S ATTORNEY
STATE OF CONNECTICUT
300 Corporate Place
Rocky Hill, CT 06067

M. JANE BRADY
ATTORNEY GENERAL
STATE OF DELAWARE
Department of Justice
820 N. French Street
Wilmington, DE 19801

CHARLES J. CRIST, JR.
ATTORNEY GENERAL
STATE OF FLORIDA
The Capitol PL-01
Tallahassee, FL 32399-1050

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO
P.O. Box 83720
Boise, ID 83720-0010

PHILL KLINE
ATTORNEY GENERAL
STATE OF KANSAS
120 S.W. 10th Avenue
Topeka, KS 66612-1597

JIM HOOD
ATTORNEY GENERAL
STATE OF MISSISSIPPI
P.O. Box 220
Jackson, MS 39205

JEREMIAH W. (JAY) NIXON
ATTORNEY GENERAL
STATE OF MISSOURI
Supreme Court Building
207 West High Street
Jefferson City, MO 65101

MIKE MCGRATH
ATTORNEY GENERAL
STATE OF MONTANA
Justice Building
215 N. Sanders
P.O. Box 201401
Helena, MT 59620-1401

BRIAN SANDOVAL
ATTORNEY GENERAL
STATE OF NEVADA
Nevada Dep't of Justice
100 North Carson Street
Carson City, NV 89701

JIM PETRO
ATTORNEY GENERAL
STATE OF OHIO
State Office Tower
30 E. Broad St.
Columbus, OH 43215-
3428

THOMAS W. CORBETT, JR.
ATTORNEY GENERAL
COMMONWEALTH OF
PENNSYLVANIA
16th Floor
Strawberry Square
Harrisburg, PA 17120

LAWRENCE E. LONG
ATTORNEY GENERAL
STATE OF SOUTH DAKOTA
500 East Capitol Avenue
Pierre, SD 57501-5070

GREG ABBOTT
ATTORNEY GENERAL
STATE OF TEXAS
Capitol Station
P.O. Box 12548
Austin, TX 78711-2548

MARK L. SHURTLEFF
ATTORNEY GENERAL
STATE OF UTAH
Utah State Office
Complex
East Office Bldg.
Suite 320
Salt Lake City, UT
84114-232

JUDITH WILLIAMS
JAGDMANN
ATTORNEY GENERAL
COMMONWEALTH OF
VIRGINIA
900 East Main Street
Richmond, VA 23219

ROB MCKENNA
ATTORNEY GENERAL
STATE OF WASHINGTON
1125 Washington Street
P.O. Box 40100
Olympia, WA 98504-0100

QUESTION PRESENTED

In *Franklin v. Lynaugh*, this Court concluded that a capital defendant does not have a constitutional right to an instruction telling the jury in the penalty phase to consider "residual doubt" about defendant's guilt. Most state and federal appellate courts have relied on *Franklin* to conclude that a capital defendant has no constitutional right to offer evidence and argue in a penalty-phase proceeding that he should receive a sentence less than death because he continues to assert his innocence of the underlying crime. The Oregon Supreme Court, however, held in this case that a capital defendant has a federal constitutional right to present in a penalty-phase proceeding alibi evidence that casts doubt on his guilt. The question presented is:

Does a capital defendant have a right under the Eighth and Fourteenth Amendments to the United States Constitution to offer evidence and argument in support of a residual-doubt claim – that is, that the jury in a penalty-phase proceeding should consider doubt about the defendant's guilt in deciding whether to impose the death penalty?

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INTEREST OF AMICI CURIAE

Each of the amici States employs the death penalty, in appropriate circumstances, as a means of punishing society's vilest offenders. As a matter of public policy, some of the amici here may choose (either now or in the future) to permit convicted capital-murder defendants to argue "residual doubt" to sentencing juries. Others have chosen (or someday will choose) not to allow such arguments. But amici are united in believing that States ought to be able to make that policy choice for themselves and that the Eighth Amendment should not be construed to impose a wooden, across-the-board rule requiring the admission of residual-doubt arguments.

STATEMENT

Having already been convicted of the capital murders of Rod and Lois Houser, respondent Randy Lee Guzek proposed to present at his sentencing hearing – purportedly as "mitigating" evidence – an alibi that would have put him somewhere other than the victims' home at the time of the killings. In other words, notwithstanding the fact that he had already been found guilty of the murders, Guzek sought to prove at sentencing that, in fact, he hadn't committed them. The trial court excluded Guzek's alibi-based "residual doubt" evidence as irrelevant to any issue that remained open on sentencing. The Oregon Supreme Court reversed and remanded for resentencing. As relevant here, the court held that Guzek had a federal constitutional right – grounded in the Eighth Amendment – to present his residual-doubt argument to the sentencing jury.

That holding is misguided and should be reversed.

SUMMARY OF ARGUMENT

The Oregon Supreme Court's decision – that a defendant, having already been convicted of capital murder, has an Eighth Amendment right to re-argue his innocence to his sentencing jury – finds no support either in this Court's case law, in history, or in logic, and entails significant practical costs. It should be rejected.

1. The plurality and concurring opinions in *Franklin v. Lynaugh*, 487 U.S. 164 (1988), show the error of the Oregon court's decision. Although technically deciding the case before it on another basis, the *Franklin* plurality emphasized that nothing in this Court's decisions "suggest[s] that capital defendants have a *right* to demand jury consideration of 'residual doubts' in the sentencing phase" and, further, that existing precedent "fail[s] to recognize a constitutional right to have such doubts considered as a mitigating factor." *Id.* at 173-74 (emphasis in original). Concurring in *Franklin*, Justices O'Connor and Blackmun would have gone farther and held squarely that "the Eighth Amendment does not require" States to permit defendants to make (or juries to consider) residual-doubt arguments. *Id.* at 187 (O'Connor, J., concurring). The Oregon court's backhanded dismissal of *Franklin* – in a brief footnote appended to the last sentence of its discussion – is, with respect, inexplicable.

2. The Oregon Supreme Court's decision constitutionalizing residual doubt goes a long way (if not quite all the way) toward increasing the prosecution's burden of proof in capital cases from the familiar "beyond a reasonable doubt" standard to something like a "beyond *all possible* doubt" standard. The history of the reasonable-doubt standard does not justify that departure, for two reasons. *First*, the reasonable-doubt standard arose in the late eighteenth century in response to the Enlightenment view that absolute certainty in human endeavors is

unattainable. Against that backdrop, a determination of guilt "beyond a reasonable doubt" reflects the highest degree of certainty possible in human affairs and signifies to the community that the defendant is – in fact – guilty. Historically, then, "beyond a reasonable doubt" is as stringent a standard as can practicably be implemented; there is no room for a higher threshold. *Second*, the reasonable-doubt standard was originally employed exclusively (or at least particularly) in capital cases. Thus, while some modern scholars have urged extra protection – over and above the reasonable-doubt standard – for capital cases, in fact, the reasonable-doubt standard *is* the extra protection for capital cases.

3. There is also no basis in logic for a rule that envisions a capital defendant asking a sentencing-phase jury to conclude that he may well not be guilty of the crime for which the guilt-phase jury has already convicted him. As an initial matter, it is worth noting that any doubt that exists on the other side of the certainty "beyond a *reasonable* doubt" required for conviction is, by definition, *unreasonable* – *i.e.*, "irrational," "absurd," "inappropriate," and "incongruous." The Court should be slow to cement into the Constitution a rule that would free jurors to make life-and-death decisions based on unreasonable hunches and impulses. Moreover, although the reasonable-doubt standard guides a jury's determination of guilt – and in some philosophical sense may permit conviction on something less than absolute certainty – once the jury's determination is reduced to a verdict, the law treats the defendant as "Guilty" *in fact*: he did it, he intended to do it, he caused the harm, etc. A residual-doubt argument literally invites the jury to undo (or to ignore, or to compromise) – and makes something of a mockery of – its solemn verdict that the defendant is "Guilty."

4. A uniform national rule requiring States to permit consideration of residual-doubt arguments would entail significant real-world costs. First, there is the confusion

that would almost certainly arise in the minds of some jurors when faced with (i) a verdict that the defendant is indeed "Guilty" of the crime charged and (ii) an argument that, on second thought, maybe the defendant isn't guilty, after all. Second, there are very real costs to requiring a prosecutor who as already established a defendant's guilt during the guilt phase of a capital trial to re-establish it for purposes of sentencing. Reconstructing a guilt-phase case would likely entail, among other things, re-calling numerous witnesses – some of whose memories may have faded, others who may not longer be available to testify at all.

ARGUMENT

There is of course no dispute that, under this Court's decisions, the Due Process Clause requires that a State prove a criminal defendant's guilt "beyond a reasonable doubt." *See In re Winship*, 397 U.S. 358, 361-64 (1970). Notwithstanding the severity of the penalty faced by a defendant in a capital-murder case, that standard of proof does not change. Indeed, in establishing the reasonable-doubt standard as a federal constitutional requirement, the Court in *Winship* repeatedly described it as applicable (generically) in all "criminal" cases, *see id.* at 361, 362, 363, 364, and, in fact, quoted for support its earlier decision in *Davis v. United States*, 160 U.S. 469, 488 (1895), for the proposition that "[n]o man should be *deprived of his life* under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them ... is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged," 397 U.S. at 363 (emphasis added); *accord id.* at 362 (citing *Leland v. Oregon*, 343 U.S. 790, 795 (1952), a capital-murder case, as precedent for reasonable-doubt standard).

The Oregon Supreme Court's decision permitting a defendant to introduce "residual doubt" evidence during the penalty phase of his capital-murder case – and following a determination of guilt beyond a reasonable doubt – boldly moves in the direction of raising the standard of proof, such that a State must prove its case *beyond all possible doubt* in order to obtain a death sentence. Several commentators have urged precisely that result in one form or another. *See, e.g.*, Leonard B. Sand & Danielle L. Rose, *Proof Beyond All Possible Doubt: Is There a Need for a Higher Burden of Proof When the Sentence May Be Death?*, 78 Chi.-Kent L. Rev. 1359 (2003); Margery Malkin Koosed, *Averting Mistaken Executions by Adopting the Model Penal Code's Exclusion of Death in the Presence of Lingering Doubt*, 21 N. Ill. U. L. Rev. 41 (2001). These proposals – variously requiring "no doubt" or proof "beyond any doubt" – may or may not make sense as a matter of public policy. And, of course, individual States are free to authorize the consideration of residual-doubt evidence in capital-sentencing hearings, either by state statute or by judicial construction of a state constitutional provision.[1]

The question here, though, is different. The question here is whether the Eighth Amendment to the United States Constitution of its own force requires *every State in the union* to allow the consideration of residual-doubt evidence, and thus (practically speaking) to ratchet up the standard of proof in capital cases. It does not. Indeed, as we will show, Guzek's call for further constitutionalization of state criminal procedure finds no support either in this Court's precedent or in the history or logic of the reasonable-doubt standard. It should be rejected.

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[1] *See, e.g., State v. Thomas*, 158 S.W.3d 361, 403 (Tenn. 2005); *People v. Musselwhite*, 954 P.2d 475, 510 (Cal. 1998); *Taylor v. State*, 404 S.E.2d 255, 262 (Ga. 1991).

I. There Is No Basis in This Court's Precedent for Constitutionalizing Residual Doubt.

This Court's case law pertaining to the question presented is remarkably straightforward, and Oregon's thorough doctrinal analysis (Oregon Br. 20-34) persuasively makes the case against Guzek's position. Accordingly, we provide only a *Cliffs Notes* version. As Oregon's brief correctly points out, the plurality and concurring opinions in *Franklin v. Lynaugh*, 487 U.S. 164 (1988), essentially resolve the issues here. *See* Oregon Br. 29-34. To reverse the Oregon Supreme Court's decision, this Court need only reaffirm – and formalize – what it said in *Franklin*.

By way of background, the notion of "residual doubt" came to the fore initially in *Lockhart v. McCree*, 476 U.S. 162 (1986), a case about the "death qualification" of jurors. There, while discussing the use of "unitary juries" in capital cases, this Court noted in passing "the possibility that, in at least some capital cases, the defendant might benefit at the sentencing phase of the trial from the jury's 'residual doubts' about the evidence presented at the guilt phase." *Id.* at 181. Seeking to capitalize on that remark, the petitioner in *Franklin* argued that it entitled him to a charge instructing the sentencing-phase jury to reconsider his guilt – specifically, to rethink whether he was actually the murderer, whether he actually caused the victim's death, and whether actually he had the requisite intent to kill. 487 U.S. at 172. The *Franklin* Court rejected his argument, and in the process, came close to resolving the question presented in this case.

"At the outset," the plurality in *Franklin* emphasized that the Court had never held, in *Lockhart* or elsewhere, "that a capital defendant has a constitutional right to an instruction telling the jury to revisit the question of his identity as the murderer as a basis for mitigation." *Id.* at 172-73. All that the *Lockhart* dicta stood for, the plurality

said, was "the simple truism that *where* 'States are willing to go to allow defendants to capitalize on "residual doubts,"' such doubts will inure to the defendant's benefit." *Id.* at 173 (emphasis in original). More to the point for present purposes, the *Franklin* plurality stressed that "*Lockhart* did not endorse capital sentencing schemes which permit such use of 'residual doubts,' let alone suggest that capital defendants have a *right* to demand jury consideration of 'residual doubts' in the sentencing phase." *Id.* (emphasis in original); *see also id.* at 174 (using scare quotes to refer to claimed "right" to have jury consider residual doubt). And, indeed, the plurality decision pointed out the fact that the Court had "not struck down the practice in some States of prohibiting the consideration of 'residual doubts' during the punishment trial." *Id.* The *Franklin* plurality summed up in a way that – at least as a matter of existing doctrine – would seem to foreclose Guzek's claim here:

> Our edict that, in a capital case, "'the sentencer . . . [may] not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense,'" in no way mandates reconsideration by capital juries, in the sentencing phase, of their "residual doubts over a defendant's guilt." Such lingering doubts are not over any aspect of a petitioner's "character," "record," or a "circumstance of the offense." *This Court's prior decisions, as we understand them, fail to recognize a constitutional right to have such doubts considered as a mitigating factor.*

Id. at 174 (citation omitted and emphasis added). Having said all of that, the *Franklin* plurality ultimately concluded that, in any event, the trial court's rejection of the defendant's proposed jury instructions did not prejudice his ability to argue – or the jury's ability to consider – the residual-doubt issue.

Joined by Justice Blackmun in a concurring opinion, Justice O'Connor would have gone farther and squarely rejected the contention that the Eighth Amendment requires States to permit residual-doubt arguments. "In [her] view," the condemned's residual-doubt claim "fail[ed], not because the Texas scheme allowed for consideration of 'residual doubt' by the sentencing body, *but rather because the Eighth Amendment does not require it.*" *Id.* at 187 (emphasis added). The Court's cases, Justice O'Connor said, simply "do not support the proposition that a defendant who has been found to be guilty of a capital crime beyond a reasonable doubt has a constitutional right to reconsideration by the sentencing body of lingering doubts about his guilt." *Id.* Perceptively, Justice O'Connor observed that a residual-doubt claim (however packaged) is tantamount to an argument "that the States must permit capital sentencing bodies to demand proof of guilt to 'an absolute certainty' before imposing the death sentence." *Id.* at 188. "Nothing in [the Court's] cases," she said, "mandates the imposition of this heightened burden of proof at capital sentencing." *Id.*

Together, the plurality and concurring opinions in *Franklin* put the writing on the wall for all to see: Whatever individual States may choose to do as a matter of public policy (or even as a matter of state constitutional law), the Eighth Amendment does not in and of itself require them to permit capital defendants to argue residual doubt to sentencing-phase juries. The Oregon Supreme Court's backhanded treatment of *Franklin* is, with respect, puzzling. Having spent pages and pages of analysis trying to tease a residual-doubt right out of *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Bell v. Ohio*, 438 U.S. 637 (1978) – decisions it conceded were distinguishable (Pet. App. 57-58) – as well as out of the specific facts of *Green v. Georgia*, 442 U.S. 95 (1979) (per curiam), the Oregon court relegated *Franklin* to a footnote appended to the very last sentence of its analysis. All the Oregon

court had to say about *Franklin* was that "a plurality of the Supreme Court strongly suggested, and the concurrence would have held, that the Eighth Amendment does not require an *instruction* that a penalty-phase jury consider any residual or lingering doubts remaining from the guilt phase" but that, in its view, *Franklin* did not "lessen[] the direction" from *Lockett*, *Bell*, and *Green* that the Eighth Amendment does require that a defendant be permitted to *introduce* residual-doubt evidence. Pet. App. 62-63 (emphasis in original).

There are two fundamental problems with the Oregon Supreme Court's attempted distinction. First, the court's characterization of the opinions in *Franklin* seems to us incorrect. A more accurate summary – supported by the quotations above – would be that the *Franklin* plurality "strongly suggested, and the concurrence would have held, that the Eighth Amendment does not require" *States to permit "consider[ation]" residual-doubt evidence at all. See* 487 U.S. at 174 (plurality); *id.* at 187 (O'Connor, J., concurring). Second, as the dissenting judges below emphasized, it is simply "impossible to imagine" how the plurality and concurring opinions in *Franklin* "could say what they said" if the Oregon court's reading of *Lockett*, *Bell*, and *Green* – all of which pre-date *Franklin* by nearly a decade – were correct. Pet. App. 71-72. (Tellingly, the *Franklin* opinions do not so much as mention *Green*, the decision the court below thought the surest source of a residual-doubt right.)

It seems to us inarguable that the clearest (and most recent) signal is *Franklin*, and we urge the Court to reaffirm what it said there.

II. There Is No Basis in the History of the Reasonable-Doubt Standard for Constitutionalizing Residual Doubt.

There is also no historical basis for minting, as a matter of federal constitutional law, a new standard of proof

in capital cases: "beyond any doubt" (or "no doubt") in place of the familiar "beyond a reasonable doubt." (As noted above, Guzek's residual-doubt position certainly tends strongly in that direction. *See supra* at 4-5.) The origins of the reasonable-doubt standard are, frankly, a little hazy. Before its advent, there was no formal standard of proof in criminal cases, and "it was generally assumed that juries were to return true verdicts." Erik Lillquist, *Absolute Certainty and the Death Penalty*, 42 Am. Crim. L. Rev. 45, 48 (2005) (hereinafter Lillquist, *Absolute Certainty*). Some scholars trace the reasonable-doubt standard to the so-called Irish Treason Cases.[2] *See, e.g.*, Jon O. Newman, *Beyond "Reasonable Doubt,"* 68 N.Y.U. L. Rev. 979, 981-82 (1993). Others date the standard's appearance somewhat earlier, to prosecutor Robert Treat Paine's argument in the Boston Massacre trials of 1770. *See, e.g.*, Steve Sheppard, *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence*, 78 Notre Dame L. Rev. 1165, 1191 (2003). In either event, there are two historical points worth noting here.

First, "[c]oncern about the requisite level of juror certainty for a criminal conviction arose around the same time as Enlightenment thinkers became concerned with the ability of humans to obtain certainty in any endeavor, but in particular in scientific matters." Lillquist, *Absolute Certainty*, *supra*, at 48. The notion of reasonable doubt, like that of "moral certainty," "'accorded with [these] contemporary views about the nature of judgment,'" *id.* at 49 (quoting Sheppard, *supra*, at 1192), and, more specifically, "developed against [the] philosophical understanding that true absolute certainty is impossible," *id.* at 74. In other words, the reasonable-doubt standard "was originally understood to capture the highest degree of

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[2] *Finney's Case*, 26 How. St. Tr. 1019 (Ir. 1798); *Bond's Case*, 27 How. St. Tr. 523 (Ir. 1798).

certainty possible in human affairs." *Id.* at 73. A jury's determination that a defendant was guilty "beyond a reasonable doubt," that is, meant (allowing for the unattainability of perfect knowledge) that the defendant was – *in fact* – guilty.

The second historical point is this: In its origin, the reasonable-doubt standard was a protection developed specifically for capital cases; indeed, "the early life of the reasonable-doubt instruction appears to be limited *solely* to capital trials." Sheppard, *supra*, at 1195 (emphasis added); *accord* 9 *Wigmore on Evidence* §2497, at 405 (Chadbourne rev. 1981) (standard was "applied first only in capital cases"). Specifically, scholars seem to agree that the rise of the reasonable-doubt standard was tied directly to increasing public discomfort with the imposition of the death penalty for relatively minor crimes:

> [T]he standard began to take shape at a time when "the penal code of England was a fearfully bloody code. Death, without benefit of clergy, was denounced against a multitude of misdoings which would now be considered, if offences at all, offences of a comparatively trivial character. The consequences of conviction to the unfortunate prisoner were not only fearful, but they were irremediable."

Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 U.C. Davis L. Rev. 85, 148-49 (2002) (quoting Hon. John Wilder May, *Some Rules of Evidence: Reasonable Doubt in Civil and Criminal Cases*, 10 Am. L. Rev. 642, 651-52 (1876)) (hereinafter Lillquist, *Recasting Reasonable Doubt*). The point is that while some modern scholars assert that there is reason for extra protection in capital cases – in the form of a heightened standard of proof, *see supra* at 5 – the historical record reveals that the reasonable-doubt standard ***is*** the extra protection for capital cases.

III. There Is No Basis in Logic for Constitutionalizing Residual Doubt.

Guzek's argument here has a palpable inconsistency and illogic about it. The constitutional rule that Guzek advocates envisions a capital defendant asking a sentencing-phase jury to conclude that he may well *not* be guilty of the very crime for which the guilt-phase jury (oftentimes, of course, the very same jury) has already convicted him. In other words, the guilt-phase jury says "Guilty"; the sentencing-phase jury says, "Well, okay, maybe not." That is not a state of affairs worth encouraging, let alone constitutionalizing.

Guzek, of course, will presumably argue that there is no actual, logical inconsistency in his argument. A "residual doubt," he will say, is simply a doubt that exists between certainty "beyond a reasonable doubt" and absolute certainty. *See* Br. for Petitioner at 14, *Franklin v. Lynaugh*, 487 U.S. 164 (1988) (No. 87-5546) (urging residual-doubt argument). And because to vote for conviction a juror need have only the former, the argument goes, it is at least theoretically possible that even a convicting juror could nonetheless harbor some residual doubt. There are two problems with that line of argument.

The first and most obvious problem is that any doubt that exists on the other side of the certainty "beyond a reasonable doubt" required for conviction is, by definition, *unreasonable*.[3] A "residual" doubt, that is, may well be "genuine," Jennifer R. Treadway, Note, *"Residual Doubt" in Capital Sentencing: No Doubt It Is an Appropriate Mitigating Factor*, 43 Case W. Res. L. Rev. 215, 229 (1992), and "real," Koosed, *supra*, at 56. Or, as the Fifth Circuit has noted, it may be "whimsical." *Smith v. Balkcom*, 660 F.2d 573, 580 (5th Cir. 1981). What it is *not* is reasonable. A "reasonable" doubt is, as its label suggests, one "based upon 'reason.'" *Jackson v. Virginia*, 443 U.S. 307, 317 (1979). A "residual" doubt – which, again, arises only beyond "reasonable doubt" – is, by contrast, "irrational," 19 *Oxford English Dictionary* 160 (2d ed. 1989) (defining "unreasonable"), "absurd, inappropriate, [and] incongruous," *Webster's Third New International Dictionary* 2507 (2002) (same). There are, amici recognize, a whole host of very good reasons why a juror might vote not to impose the death penalty. But an *unreasonable* doubt about a defendant's guilt – whether called residual, lingering, or whimsical – is not one of them.

[3] A "residual" doubt that *is* reasonable is not really residual at all; it is a stand-alone basis for acquittal, not just mercy.

The second logical problem with Guzek's argument arises because, as the Florida Supreme Court has famously pointed out, "[a] convicted defendant cannot be 'a little bit guilty.'" *Buford v. State*, 403 So.2d 943, 953 (Fla. 1981). In the eyes of the law, either he did it or he didn't. That, of course, is why, upon a conviction, the jury's verdict pronounces the defendant "Guilty" of the charged offense – *not* "Guilty Beyond a Reasonable Doubt," but simply "Guilty." A "Guilty" verdict is not a philosophical abstraction. To the contrary, it embodies a real-world judgment – and signifies to the community – that the accused *in fact* was present at the scene, *in fact* intended to commit the charged crime, *in fact* carried out the act that constitutes that crime, and *in fact* caused the harm charged.

Now, it is of course true that a jury can convict – and pronounce a defendant "Guilty" in fact – even if it is not absolutely, positively certain of his guilt. But that is not because we as a society have concluded that it is okay to condemn innocent people. Rather, it is because we as a society have come to grips with the Enlightenment insight that perfect knowledge is oftentimes unattainable. The reasonable-doubt standard, in short, is the best we've got; it is "designed to exclude as nearly as possible" – in a real

and imperfect world – "the likelihood of an erroneous judgment." *Addington v. Texas*, 441 U.S. 418, 423 (1979); *accord Winship*, 397 U.S. at 364 (reasonable-doubt standard requires "subjective state of certitude," "utmost certainty"). *See also* Lillquist, *Absolute Certainty*, *supra*, at 52-53 ("[O]ne of the primary assumptions of our present criminal justice system [is] that we are only convicting defendants in ordinary criminal cases upon the most exacting of proof standards.").

All of this is to say that, while the reasonable-doubt standard exists to guide the jury's determination of guilt, once the jury's determination is reduced to a verdict – and later memorialized in a court judgment – the law treats the defendant as "Guilty" *in fact*. The assertion that, in the abstract, there may be some philosophical "space" between certainty beyond a reasonable doubt and absolute certainty does not change the fact that a residual-doubt argument like Guzek's literally invites the jury to undo (or to ignore, or to compromise) its solemn verdict. Again, a "Guilty" verdict necessarily means, in a murder prosecution, that the defendant in fact (i) was there, (ii) intended to kill, (iii) committed the act, and (iv) caused the victim's death. To argue that the Eighth Amendment guarantees a defendant's right to ask sentencing jurors to conclude that, in retrospect, perhaps the defendant wasn't there – or didn't intend to kill, or didn't cause the death – is to make a mockery of the guilt-phase verdict and to "cast[] a shadow over the reliability and credibility of our legal system." *State v. McGuire*, 686 N.E.2d 1112, 1123 (Ohio 1997); *see also Report on the Governor's Commission on Capital Punishment* 147-48 (submitted to Illinois Governor George H. Ryan April 15, 2002) (residual-doubt argument would be "completely contradictory" to the facts underlying guilt-phase verdict).

Guzek's argument comes very close – if it does not go all the way – to constitutionalizing a defendant's right to invite the jury to lawlessness. It should be rejected.

IV. The Constitutionalization of Residual Doubt Would Entail Significant Societal Costs.

There is one practical point worth making. The rule that Guzek advocates – a uniform national requirement that all States permit capital defendants to make residual-doubt arguments to sentencing juries – would not come without costs. As an initial matter, Guzek's position poses a very real danger of juror confusion. What, exactly, is a juror to do when faced with (i) the knowledge that the defendant before him is indeed "Guilty" of the crime charged and (ii) an argument that, on second thought, perhaps the defendant isn't guilty, after all? Even setting aside the question whether the fine, philosophical distinction between guilt "beyond a reasonable doubt" and guilt in fact has any legitimate role to play here (*see supra* at 12-14), the strong likelihood is that at least some lay jurors just won't be able to grasp it. Many, we fear, will be left simply scratching their heads.

State lawmakers and judges, of course, make every effort to structure trial proceedings in such a way as to minimize juror confusion. *See, e.g.* Ala. R. Evid. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of ... confusion of the issues ... or misleading the jury ...."). And, traditionally, trial judges have been given discretion to control both their courtrooms and the evidence in a manner best calculated to avoid that confusion. *See, e.g.*, *United States v. Abel*, 469 U.S. 45, 54-55 (1984). Under Guzek's wooden rule, at least with respect to the confusion that would attend residual-doubt arguments, that flexibility would be no longer.

Second, there are very real societal costs to requiring a prosecutor who has already established a defendant's guilt during the (aptly named) guilt phase of a trial to re-establish it for purposes of sentencing: Yes, the defendant intended to kill; yes, the defendant committed the act;

yes, the defendant caused the victim's death; and (particularly relevant here) no, the defendant does not have an alibi. A prosecutor should not be made to re-try his guilt-phase case during the penalty phase just because a *convicted* defendant continues to believe – notwithstanding his conviction – that he can poke holes in it.

Obviously, this problem will be most acute in cases like this, where the guilt-phase and sentencing-phase juries are different (say, because there is a re-sentencing). Faced with a convicted defendant arguing to twelve *new* jurors that, in fact – and whatever the jurors before them might have thought – he didn't do it, a conscientious prosecutor would almost surely feel compelled to reconstruct his entire guilt-phase case to ensure that a full and fair factual picture was presented and that an appropriate sentence was pronounced. The problem, of course, is that doing so would entail, among other things, re-calling numerous witnesses – some of whose memories may have faded, others who may no longer be available to testify at all. Even where the guilt-phase jury will also determine the sentence, it is not hard to imagine that a prosecutor would not feel comfortable simply standing pat in the face of a defendant's continuing efforts to un-ring the bell of his conviction.

The point is that, in either case, having successfully made its case for guilt, the State should not be required to make it all over again at sentencing. A rule requiring as much risks draining scarce resources, both prosecutorial and judicial. Individual States, of course, are free to make that choice (and incur the costs) as a matter of policy; some do and will. But States should not have that choice foisted upon them as a mater of federal constitutional law.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Oregon Supreme Court.

Respectfully submitted,

TROY KING
Attorney General

KEVIN C. NEWSOM
Solicitor General
Counsel of Record

STATE OF ALABAMA
11 South Union Street
Montgomery, Alabama 36130-0152
(334) 242-7300

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In the Supreme Court of the United States

STATE OF OREGON, PETITIONER

v.

RANDY LEE GUZEK

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

PAUL D. CLEMENT
Solicitor General
Counsel of Record

JOHN C. RICHTER
Acting Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

KANNON K. SHANMUGAM
Assistant to the Solicitor General

ROBERT J. ERICKSON
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a defendant who has been convicted of capital murder is entitled, under the Eighth Amendment to the Constitution, to present evidence or argument that he should not be sentenced to death because of "residual doubt" about his guilt.

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INTEREST OF THE UNITED STATES

This case presents the issue whether a capital defendant is constitutionally entitled to present evidence or argument that he should not be sentenced to death because of "residual doubt" about his guilt. Congress has enacted two parallel statutory schemes establishing procedures for the imposition of the death penalty for different offenses. See 18 U.S.C. 3591-3598 (2000 & Supp. II 2002); 21 U.S.C. 848. The first of those statutory schemes requires the finder of fact to consider "any mitigating factor," including "factors in the defendant's background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence," 18 U.S.C. 3592(a), and, where a mitigating factor exists, to consider

whether the aggravating factor or factors "sufficiently outweigh" the mitigating factor or factors to justify a sentence of death, 18 U.S.C. 3593(e). The second of those schemes requires the finder of fact to consider "mitigating factors, including * * * factors in the defendant's background or character [that] mitigate against imposition of the death sentence," 21 U.S.C. 848(m), and to consider whether the aggravating factor or factors "sufficiently outweigh" the mitigating factor or factors to justify a sentence of death, 21 U.S.C. 848(k); it further provides that the finder of fact, "regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence," *ibid.* Both statutory schemes permit a defendant to present any "relevant" evidence at sentencing. 18 U.S.C. 3593(c) (2000 & Supp. II 2002); 21 U.S.C. 848(j). Whether a capital defendant has a right under these statutes to present evidence or argument pertaining to "residual doubt" at the sentencing phase of proceedings may well turn on the Court's resolution of the constitutional question presented. The United States therefore has a substantial interest in this case.

STATEMENT

1. On the night of June 28, 1987, respondent and two friends, Mark Wilson and Ross Cathey, planned to burglarize a home in Deschutes County, Oregon, that they believed contained a large amount of jewelry. They aborted the burglary, however, when they arrived at the house and determined that there were too many lights on and too many cars parked outside. Pet. App. 8; 797 P.2d 1031, 1032 (Or. 1990).

The three men decided to burglarize another home instead. Cathey suggested the home of Rod and Lois Houser; the others agreed. Respondent had previously

dated the Housers' niece, who also lived at the home; the niece had broken off the relationship, and relations between respondent and Rod Houser were not amicable. The three men went first to respondent's home, where respondent picked up a rifle and a pistol to be used in the burglary. They agreed that they would kill the Housers if the Housers were home when they arrived. Along the way, they stopped off so that respondent could show Wilson how to use the rifle. Pet. App. 8; 797 P.2d at 1032.

When the three men arrived at the Housers' home, respondent pounded on the door, and Rod Houser answered. After a short argument with Houser, respondent yelled to Wilson, "Do it!" Using the rifle, Wilson repeatedly shot Houser, killing him. Respondent ran upstairs and, using the pistol, repeatedly shot Lois Houser, killing her. The three men then ransacked the house and stole various property, including a ring that respondent took from Lois Houser's finger. The bodies of the Housers were discovered by their two daughters, who subsequently saw and identified the Housers' belongings in respondent's possession. Pet. App. 8-9; 797 P.2d at 1032.

2. Respondent was charged with two counts of aggravated murder. Cathey and Wilson confessed and pleaded guilty to reduced charges in return for testifying against respondent. 797 P.2d at 1032. During the guilt phase of the trial, respondent's grandfather testified that respondent had been with him between 9 p.m. and 2 a.m. on the night of the murders. Pet. App. 42. A jury found respondent guilty on both counts, and respondent was sentenced to death. The Oregon Supreme Court affirmed respondent's conviction, but vacated his sentence. 797 P.2d 1031. Following its decision in an earlier case (which, in turn, followed this

Court's decision in *Penry* v. *Lynaugh*, 492 U.S. 302 (1989)), the court reasoned that respondent's death sentence was invalid because the jury was not given a general instruction that it could take into account any constitutionally relevant mitigating evidence. 797 P.2d at 1034.

3. On remand for resentencing, respondent was again sentenced to death. The Oregon Supreme Court, however, again vacated respondent's sentence, and remanded for a third sentencing proceeding. 906 P.2d 272 (1995). In a 4-3 decision, the court reasoned that the trial court's admission of victim-impact evidence in the retrial on sentencing was erroneous under the applicable version of the state death-penalty statute. See *id.* at 287.

4. a. At the third sentencing proceeding, respondent sought to introduce (1) the transcript of his since-deceased grandfather's testimony from the guilt phase that respondent had been with him from 9 p.m. to 2 a.m. on the night of the murders and (2) testimony from his mother that respondent had been at her home from shortly after 2 a.m. until at least 4:20 a.m. Pet. App. 42-43. The trial court excluded that alibi evidence. See J.A. 89 (stating that "[t]he jury is going to be told that [respondent] has been found guilty and this is the penalty phase" and that "I don't intend for evidence to be offered that's inconsistent with that representation"). Respondent was again sentenced to death.

b. In the decision under review, the Oregon Supreme Court again vacated respondent's sentence, and remanded for a fourth sentencing proceeding. Pet. App. 1-86. The State conceded on appeal, and the Oregon Supreme Court unanimously held, that the trial court erred by refusing to instruct the jury that respondent could be sentenced to life imprisonment without

the possibility of parole. *Id.* at 11-13; *id.* at 67 (Gillette, J., concurring in part and dissenting in part).

The Oregon Supreme Court proceeded to address various issues that it believed were "likely to arise on remand"—one of which was whether the trial court had erred by refusing to admit respondent's alibi evidence. Pet. App. 42-62. The court first held, by a 3-2 majority, that the trial court had erred by excluding the transcript of the grandfather's testimony, reasoning that, under state law, the transcript of any testimony from the guilt phase was admissible at the sentencing phase. *Id.* at 43-44.

The Oregon Supreme Court then held, also by a 3-2 majority, that the trial court had likewise erred by excluding the mother's testimony.[1] The court first construed the state death-penalty statute, Or. Rev. Stat. § 163.150 (2003), which instructs the jury to consider "any mitigating evidence concerning any aspect of the defendant's character or background[] or any circumstances of the offense," to permit the admission only of "evidence that a defendant is *constitutionally* entitled to introduce during the penalty phase." Pet. App. 52 (emphasis added).

Having thus construed state law, the Oregon Supreme Court proceeded to hold that respondent was entitled, under the Eighth Amendment, to present the mother's testimony at the sentencing phase of his trial.

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[1] Respondent's mother had previously testified, at the guilt phase of respondent's initial trial, that respondent had been at her home on the evening of the murders. J.A. 60-79. It appears, however, that respondent sought to present live testimony from the mother at his third sentencing proceeding, rather than to introduce a transcript of her prior testimony, and that it was for that reason that the Oregon Supreme Court analyzed the grandfather's testimony and the mother's testimony discretely. Pet. App. 43-44.

Pet. App. 52-64. The court reasoned that, in *Lockett* v. *Ohio*, 438 U.S. 586 (1978), and the companion case of *Bell* v. *Ohio*, 438 U.S. 637 (1978), this Court held that a sentencer must be able to consider "any evidence relevant to any circumstances of the offense that mitigates against imposition of the death penalty," including "evidence that a defendant played an insignificant role in the offense or otherwise possessed a less culpable *mens rea*." Pet. App. 57. The court acknowledged that respondent's evidence was inconsistent with the underlying convictions, whereas the mitigating evidence at issue in *Lockett* and *Bell* was not. *Id.* at 58. The court concluded, however, that "the foregoing factual distinction * * * [was] of no consequence" in light of this Court's decision in *Green* v. *Georgia*, 442 U.S. 95 (1979) (per curiam). Pet. App. 58. The court reasoned that *Green* stood for the proposition that, "under *Lockett*, [a] defendant's evidence that he had not participated in the murder was a relevant circumstance of the offense that the sentencer must consider." *Id.* at 60.

In a footnote, the Oregon Supreme Court distinguished this Court's decision in *Franklin* v. *Lynaugh*, 487 U.S. 164 (1988). Pet. App. 62 n.30. The court recognized that, in *Franklin*, "a plurality of the Supreme Court strongly suggested, and the concurrence would have held, that the Eighth Amendment does not require an *instruction* that a penalty-phase jury consider any *residual or lingering doubts* remaining from the guilt phase." *Ibid.* According to the court, however, "nothing in that decision lessened the direction from *Lockett* [and its progeny] that the Eighth Amendment *does* require that a defendant be permitted to *introduce*, and a jury be able to consider, *mitigating evidence relevant to any circumstances of the offense*, such as evidence that would lessen the defendant's culpability in the offense." *Id.* at 62-63 n.30. The court concluded that any "residual" doubt from the guilt phase was "qualitatively different from actual 'evidence' proffered during the penalty phase." *Id.* at 63 n.30.

Justice Gillette, joined by Chief Justice Carson, dissented in relevant part. Pet. App. 67-86. With regard to the grandfather's testimony, he reasoned that the testimony should have been excluded because the state death-penalty statute, in his view, limited the admissibility of *any* evidence to "relevant" evidence. *Id.* at 69. With regard to the mother's testimony, Justice Gillette agreed with the majority that "what the legislature intended to allow as 'mitigating' evidence was precisely what the United States Supreme Court would require pursuant to the federal constitution; nothing more, nothing less." *Id.* at 70. On the federal constitutional issue, however, he disagreed with the majority's characterization of this Court's decision in *Green*, reasoning that the defendant in *Green* sought to introduce not evidence of innocence, but rather "evidence about his minor participation in the actual killing of the victim, which was precisely the type of evidence made relevant by * * * *Lockett*." *Id.* at 73. He added that "*Green* does not mention the Eighth Amendment," and that "[a]nswering the Eighth Amendment question * * * was unnecessary to the Court's disposition of the case." *Id.* at 77.

Instead, Justice Gillette noted, "Supreme Court cases discussing 'residual doubt' arguments strongly suggest that alibi evidence is not relevant to a 'circumstance of the offense' and, therefore, the Eighth Amendment does not require its admission." Pet. App. 79. He observed that, in *Franklin*, "the plurality suggested in the strongest terms that a defendant had no consti-

tutional right to argue, during the penalty phase, that the defendant's life should be spared because there was a possibility that he was innocent." *Id.* at 80. He added that Justice O'Connor, in her concurring opinion in *Franklin*, "would have reached the constitutional issue directly and precluded any consideration of residual doubt as a mitigating factor." *Id.* at 82. "[G]iven that the Court has allowed states to bar residual doubt *arguments*," Justice Gillette concluded, "it appears to follow ineluctably that, consistent with the Eighth Amendment, the Court would allow states to exclude *evidence* that is relevant only because it would bolster those arguments." *Id.* at 83.[2]

SUMMARY OF ARGUMENT

The Eighth Amendment does not require that a capital defendant be allowed to argue that, although a jury has already determined that the defendant was guilty beyond a reasonable doubt, he should nevertheless not be sentenced to death because of "residual doubt" about his guilt. Although this Court has held that a capital defendant is entitled to present evidence

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[2] As Oregon noted in its petition for certiorari (at 3 n.3), the Oregon Supreme Court's decision was "final" for purposes of the relevant jurisdiction statute, see 28 U.S.C. 1257(a), because it falls within the third category of cases described in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975): namely, cases in which "the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case," *id.* at 481. If respondent were to be sentenced to death on remand notwithstanding the admission of the alibi evidence, the federal constitutional issue would be mooted; if respondent were to be sentenced to life, Oregon would be precluded from seeking resentencing by the Double Jeopardy Clause. See *Arizona* v. *Rumsey*, 467 U.S. 203, 209-212 (1984).

of mitigating factors at sentencing, it has limited the concept of constitutionally mandated mitigating evidence to two categories: evidence of the defendant's character or record, and evidence of the circumstances of the offense. Evidence of "residual doubt" is different in kind. As this Court has noted, the very concept of "mitigation" is premised on the assumption that the defendant has committed the offense for which he offers mitigating evidence. Unsurprisingly, therefore, none of this Court's cases suggests that "residual doubt" qualifies as a mitigating factor.

In *Franklin* v. *Lynaugh*, 487 U.S. 164 (1988), a plurality of this Court strongly intimated, and Justices O'Connor and Blackmun would have held, that consideration of "residual doubt" at sentencing is not constitutionally required. There is no justification for repudiating such a rule in this case. A contrary rule would improperly permit a jury, at its discretion, effectively to apply a higher standard of proof in capital sentencing than the "reasonable doubt" standard applied in all other criminal cases. Even assuming that some higher standard of proof could be discerned, the traditional "reasonable doubt" standard is sufficient to ensure that a jury does not convict a defendant when it has genuine doubts about his guilt. Although States remain free to authorize juries to consider "residual doubt" at the sentencing phase, nothing in the Constitution requires them to do so.

ARGUMENT

THE EIGHTH AMENDMENT DOES NOT ENTITLE A CAPITAL DEFENDANT TO RELY ON "RESIDUAL DOUBT" AS A SENTENCING FACTOR

The Eighth Amendment to the Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend. VIII. It does not constitute cruel and unusual punishment to preclude a defendant—whom the jury has found guilty beyond a reasonable doubt—from arguing at the sentencing phase that the jury should not sentence him to death because of "residual doubt" about his guilt. At the sentencing phase of a capital proceeding, "the jury is no longer deciding between guilt and innocence," but is instead "deciding between life and death." *Deck* v. *Missouri*, 125 S. Ct. 2007, 2014 (2005). There is no valid constitutional justification for blurring those inquiries and mandating that a jury reconsider a defendant's guilt at the sentencing phase. Nor is there a valid justification for interpreting the Constitution to mandate that the jury be allowed to deviate, at its discretion, from the traditional "reasonable doubt" standard, which appears to have been developed precisely for the purpose of protecting defendants in capital proceedings. The Oregon Supreme Court therefore erred in holding that respondent was constitutionally entitled to present evidence or argument pertaining to "residual doubt" at the sentencing phase of his trial.[3]

[3] The Oregon Supreme Court expressly held only that "any alibi evidence that [respondent] proffers in mitigation shall be admissible." Pet. App. 64. A necessary corollary of that holding, however, is that respondent was constitutionally entitled to *argue*, based on that evidence, that the jury should take into account any "residual doubt" about respondent's guilt. Were it otherwise, respondent could not have complained about the failure to admit any alibi evidence at the sentencing phase, because any such error would have been harmless. See *id.* at 69, 83-86 (Gillette, J., concurring in part and dissenting in part).

A. The Requirement Of Mitigating Evidence In A Capital Case Encompasses Facts About The Defendant's Background And Character And The Circumstances Of His Offense, Not "Residual Doubt" About Whether The Defendant Has Committed An Offense In The First Place

1. Because the death penalty is a unique sanction, this Court has frequently emphasized that it would be unconstitutional to afford a sentencer "unbridled discretion" in deciding whether to impose it. *Penry* v. *Lynaugh*, 492 U.S. 302, 326 (1989). That principle was first articulated in *Furman* v. *Georgia*, 408 U.S. 238 (1972) (per curiam), which overturned the sentences of two defendants who were sentenced under statutes that gave the jury complete discretion to impose the death penalty. Although each of the justices in the *Furman* majority wrote separately, *Furman* has since come to stand for the proposition that "the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." *Maynard* v. *Cartwright*, 486 U.S. 356, 362 (1988); accord *Gregg* v. *Georgia*, 428 U.S. 153, 188-189 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). Consistent with the *Furman* principle, the Court has required that the trier of fact narrow the category of those eligible for the death penalty by finding at least one aggravating factor that provides reasonable justification for a more severe

sentence. See *Zant* v. *Stephens*, 462 U.S. 862, 877-878 (1983).

At the same time, in order that the sentencer in a capital case may make "an *individualized* determination [about punishment] on the basis of the character of the individual and the circumstances of the crime," *Zant*, 462 U.S. at 879, the sentencer must be allowed to consider certain mitigating factors in selecting a defendant's sentence. The concept of constitutionally required mitigating factors originated in *Woodson* v. *North Carolina*, 428 U.S. 280 (1976). In the controlling opinion in *Woodson*, Justices Stewart, Powell, and Stevens determined that North Carolina's mandatory death-penalty statute was unconstitutional because, among other reasons, it "fail[ed] to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." *Id.* at 303. The joint opinion concluded that "consideration of the character and record of the individual offender and the circumstances of the particular offense" was "a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.* at 304.

In *Lockett* v. *Ohio*, 438 U.S. 586 (1978), a plurality of four justices elaborated on the *Woodson* joint opinion's concept of mitigating factors. They reasoned that the *Woodson* joint opinion had left open "which facets of an offender or his offense it deemed 'relevant' in capital sentencing or what degree of consideration of 'relevant facets' it would require." *Id.* at 604. The plurality concluded that the Eighth Amendment "require[d] that the sentencer * * * not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for

a sentence less than death." *Ibid.* At the same time, however, the plurality stressed that it did not intend to "limit[] the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of *his offense*." *Id.* at 604 n.12 (emphasis added). The plurality ultimately determined that Ohio's capital-sentencing scheme was invalid because it precluded the defendant from relying at sentencing on "[t]he absence of direct proof that the defendant intended to cause the death of the victim" or "defendant's comparatively minor role in the offense." *Id.* at 608.

In *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982), a majority of the Court adopted the plurality's reasoning in *Lockett*. After quoting the *Lockett* plurality's definition of mitigating factors, *id.* at 110, the Court held that evidence of a defendant's difficult family history and emotional disturbance constituted "relevant mitigating evidence" under that definition, *id.* at 115.

2. None of this Court's decisions following *Woodson*, *Lockett*, and *Eddings* contains any indication that "residual doubt" is a constitutionally mandated sentencing factor in capital proceedings. Indeed, those cases suggest that the concept of constitutionally mandated mitigating evidence is premised on the defendant's conviction of the underlying offense, and therefore does not include evidence designed to undermine that premise.

In cases addressing various aspects of a sentencer's consideration of mitigating factors, the Court has repeatedly relied on the *Lockett* plurality's definition, and has never indicated that the concept of constitutionally mandated mitigating factors extends beyond that definition's two broad categories. See, *e.g.*, *McKoy* v. *North Carolina*, 494 U.S. 433, 443 (1990) (referring to "mitigating evidence relevant to a defendant's char-

acter or record or the circumstances of the offense" (citation omitted)); *Penry*, 492 U.S. at 328 (stating that "jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime"); *Mills* v. *Maryland*, 486 U.S. 367, 374 (1988) (quoting *Lockett* plurality's definition of mitigating factors); *Skipper* v. *South Carolina*, 476 U.S. 1, 4 (1986) (same); cf. *Hitchcock* v. *Dugger*, 481 U.S. 393, 398-399 (1987) (citing *Lockett* and *Eddings* in invalidating death sentence where jury was instructed not to consider non-statutory mitigating circumstances).[4]

In discussing the concept of mitigating factors generally, and in discussing the "circumstances of the offense" category of mitigating factors specifically, the Court has consistently presupposed the defendant's factual guilt, thereby foreclosing the argument that any remaining doubt as to whether the defendant *committed* the offense constitutes a "circumstance of the offense" for mitigation purposes. See, *e.g.*, *Blystone* v. *Pennsylvania*, 494 U.S. 299, 305 (1990) (stating that it is "sufficient under *Lockett* and *Penry*" for sentencer to be allowed to consider "the mitigating circumstances present in the particular crime committed by the parti-

[4] The courts of appeals have routinely upheld the exclusion of evidence that did not fall within either of the categories of mitigating factors specified by the *Lockett* plurality. See, *e.g.*, *Beardslee* v. *Woodford*, 358 F.3d 560, 579 (9th Cir.) (evidence that co-defendants received non-capital sentences), cert. denied, 125 S. Ct. 281 (2004); *Standard* v. *Parker*, 266 F.3d 442, 461 (6th Cir. 2001) (testimony by former death-row inmate concerning death penalty generally), cert. denied, 537 U.S. 831 (2002); *United States* v. *Johnson*, 223 F.3d 665, 674-675 (7th Cir. 2000) (evidence concerning existence of maximum-security units in federal prisons), cert. denied, 534 U.S. 829 (2001).

cular defendant"); *Sumner* v. *Shuman*, 483 U.S. 66, 78-79 (1987) (noting that "[t]he fact that a life-term inmate is convicted of murder does not reflect whether any circumstance existed at the time of the murder that may have lessened his responsibility for his acts even though it could not stand as a legal defense to the murder charge," and adding that "the level of criminal responsibility of a person convicted of murder may vary according to the extent of that individual's participation in the crime"); cf. *California* v. *Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (observing that "the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime"); *Skipper*, 476 U.S. at 13 (Powell, J., concurring) (referring to "[e]vidence concerning the degree of the defendant's participation in the crime").

The Court has also rejected arguments that the sentencer must be allowed to consider factors other than the mitigating factors specified in *Lockett* and *Eddings* in deciding whether to impose the death penalty. In *Blystone* v. *Pennsylvania*, *supra*, and *Boyde* v. *California*, 494 U.S. 370 (1990), the Court upheld state sentencing schemes that required the sentencer to impose the death penalty after determining that the aggravating circumstances outweighed the mitigating circumstances. In *Boyde*, the Court refused to accept the proposition that "the jury must have freedom to decline to impose the death penalty even if the jury decides that the aggravating circumstances 'outweigh' the mitigating circumstances," reasoning that "there is no such constitutional requirement of unfettered sentencing discretion in the jury." 494 U.S. at 377. Similarly, in *California* v. *Brown*, *supra*, and *Saffle* v. *Parks*, 494 U.S. 484 (1990), the Court upheld so-called

"anti-sympathy" jury instructions, which advised the jury not to "be swayed by mere * * * sympathy," *Brown*, 479 U.S. at 539, and to "avoid any influence of sympathy," *Saffle*, 494 U.S. at 487, in deciding whether to impose the death penalty. In *Saffle*, the Court dismissed the defendant's reliance on *Lockett* and *Eddings*, reasoning that those cases held only that "the State cannot bar relevant mitigating evidence from being presented and considered during the penalty phase of a capital trial," *id.* at 490, and adding that "[w]hether a juror feels sympathy for a capital defendant is more likely to depend on that juror's own emotions than on the actual evidence regarding the crime and the defendant," *id.* at 493.

These cases reinforce the view that the concept of constitutionally relevant mitigating evidence presupposes that a capital defendant has committed a crime that exposes him to the death penalty, and that the mitigation question is whether features of the crime or the defendant's background or character lessen his culpability for that crime. See *Tennard* v. *Dretke*, 124 S. Ct. 2562, 2570-2572 (2004); *Brown*, 479 U.S. at 545 (O'Connor, J., concurring). That understanding of the purpose of mitigating evidence is inconsistent with the submission that there is a constitutional right to introduce evidence, at sentencing, that *contradicts* the guilt-phase jury's conclusion that the defendant did indeed commit the offense.

B. This Court's Decisions Support The Conclusion That Evidence Of "Residual Doubt" Is Not A Constitutionally Mandated Mitigating Factor

1. In *Franklin* v. *Lynaugh*, 487 U.S. 164 (1988), this Court was presented with the question whether "residual doubt" is a constitutionally mandated sentencing factor. Although the Court did not definitively resolve that question, two members of the Court would have held, and a four-Justice plurality strongly intimated, that consideration of "residual doubt" is not constitutionally required. The reasoning given in support of that conclusion is correct.

a. The defendant in *Franklin* was charged with the murder of a woman who had been stabbed and left for dead and who later died in hospital. 487 U.S. at 167. During the guilt phase of his trial, the defendant contended that he had been mistakenly identified and that, even assuming that he was the person who had committed the stabbing, the victim's death was the result of incompetent medical treatment. *Id.* at 168. The defendant was found guilty of capital murder. *Ibid.* During the penalty phase, the defendant proposed jury instructions that "would have told the jury that any evidence considered by them to mitigate against the death penalty should be taken into account in answering" Texas's "special issues," even if the jury would otherwise have answered yes to those issues. *Id.* at 169-170. The trial court declined to give those instructions, and the defendant was sentenced to death. *Id.* at 170. Before this Court, the defendant contended, *inter alia*, that, because "the jury may, in its penalty deliberations, have harbored 'residual doubts'" about his guilt, "the jury should have been instructed that it could

consider any such doubts in arriving at its answers to the Special Issues." *Id.* at 172.

This Court upheld the defendant's death sentence. In an opinion written by Justice White and joined by the Chief Justice and Justices Scalia and Kennedy, a plurality of the Court noted that "this Court has never held that a capital defendant has a constitutional right to an instruction telling the jury to revisit the question of his identity as the murderer as a basis for mitigation." 487 U.S. at 172-173. The plurality rejected the defendant's contention that *Lockhart* v. *McCree*, 476 U.S. 162 (1986), supported such a constitutional right. 487 U.S. at 173. In *Lockhart*, the Court had upheld the removal for cause, before the guilt phase, of jurors whose opposition to the death penalty was so strong that it would substantially impair the performance of their duties at the sentencing phase. 476 U.S. at 165. In so holding, the Court had reasoned that States had an interest in obtaining a single jury for both the guilt and sentencing phases of a defendant's trial, because of "the possibility that, in at least some capital cases, the defendant might benefit at the sentencing phase of the trial from the jury's 'residual doubts' about the evidence presented at the guilt phase." *Id.* at 181. The *Franklin* plurality reasoned that *Lockhart* stood only for "the simple truism that *where* 'States are willing to * * * allow defendants to capitalize on "residual doubts,'" such doubts will inure to the defendant's benefit." 487 U.S. at 173 (quoting *Lockhart*, 476 U.S. at 181). Like the dissenting opinion in *Lockhart*, the plurality noted that the Court had not "struck down the practice in some States of prohibiting the consideration of 'residual doubts' [at sentencing]." *Ibid.* (citing *Lockhart*, 476 U.S. at 205-206 (Marshall, J., dissenting)). The plurality concluded that "*Lockhart* did not endorse

capital sentencing schemes which permit such use of 'residual doubts,' let alone suggest that capital defendants have a *right* to demand jury consideration of 'residual doubts' in the sentencing phase." *Ibid.*

The *Franklin* plurality similarly rejected the defendant's reliance on *Lockett* and *Eddings*. 487 U.S. at 174. The plurality reasoned that the rule of *Lockett* and *Eddings* "in no way mandates reconsideration by capital juries, in the sentencing phase, of their 'residual doubts' over a defendant's guilt." *Ibid.* "Such lingering doubts," the plurality continued, "are not over any aspect of petitioner's 'character,' 'record,' or a 'circumstance of the offense.'" *Ibid.* The plurality thus concluded that "[t]his Court's prior decisions, as we understand them, fail to recognize a constitutional right to have such doubts considered as a mitigating factor." *Ibid.*[5]

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[5] In a footnote, the plurality reasoned that a constitutional entitlement to rely on "residual doubt" at the sentencing phase would be "arguably inconsistent with the common practice of allowing penalty-only trials on remand of cases where a death sentence—but not the underlying conviction—is struck down on appeal." *Franklin*, 487 U.S. at 173 n.6; accord *id.* at 188 (O'Connor, J., concurring in the judgment). That reasoning was correct. A jury empaneled solely for the purpose of determining a defendant's sentence would obviously have no "residual" doubt from any prior guilt phase. And if consideration of some level of doubt short of "reasonable doubt" were constitutionally mandated at sentencing, a defendant in a sentencing-only proceeding would presumably be entitled to re-introduce any evidence of innocence from the guilt phase—and the State would presumably be entitled to meet that evidence with any evidence of guilt. As a result, such a "sentencing-only" proceeding would effectively be transformed into a full retrial, at which the defendant could relitigate his guilt before a new jury. That possibility is amply illustrated by the multiple resentencings that have occurred (and will occur) in this case. If the court below is correct, evidence from the guilt-phase

Ultimately, however, the plurality reasoned that, "even if such a right existed, nothing done by the trial court impaired [the defendant's] exercise of this 'right.'" 487 U.S. at 174. The plurality noted that the defendant was given the opportunity to "press the 'residual doubts' question" with the jury at sentencing, *ibid.*, and further observed that the defendant "did not draw the jury's attention to the 'residual guilt' question" in his closing argument, *id.* at 175 n.7. Moreover, the plurality determined that the trial court's rejection of the defendant's proposed jury instructions was "without impact on the jury's consideration of the 'residual doubts' issue" because, among other reasons, the defendant's instructions "offered *no* specific direction to the jury concerning the potential consideration of 'residual doubt.'" *Id.* at 174.[6]

b. Justice O'Connor, joined by Justice Blackmun, concurred in the judgment. Justice O'Connor disagreed with the plurality's view that "the special verdict questions did not prevent the jury from giving mitigating effect to its 'residual doubt[s]' about [the defendant's] guilt." 487 U.S. at 187. She therefore reached the constitutional question raised by the defendant, and concluded that the Eighth Amendment did not require consideration of "residual doubt." *Ibid.* Like the plurality, Justice O'Connor observed that "[o]ur cases do not support the proposition that a defendant who has

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trial will be admissible each time a new sentencing is ordered based on other errors.

[6] Although dissenting on other grounds, Justice Stevens, joined by Justices Brennan and Marshall, stated that he "d[id] not disagree" with the plurality's explanation "why in this case there was no interference with any right petitioner may have had under the Eighth Amendment to have the jury consider 'residual doubt' in making its sentencing determination." 487 U.S. at 189.

been found to be guilty of a capital crime beyond a reasonable doubt has a constitutional right to reconsideration by the sentencing body of lingering doubts about his guilt." *Ibid.* Citing *Lockhart*, she noted that, while some States "permit[ted] defendants in some cases to enjoy the benefit of doubts that linger from the guilt phase of the trial," "we have never indicated that the Eighth Amendment requires States to adopt such procedures." *Id.* at 187-188.

Justice O'Connor agreed with the plurality that *Lockett* and *Eddings* provided no support for the defendant's claim, because "'residual doubt' about guilt is not a mitigating circumstance." 487 U.S. at 188. She reasoned that "'[r]esidual doubt' is not a fact about the defendant or the circumstances of the crime." *Ibid.* Instead, "[i]t is * * * a lingering uncertainty about facts, a state of mind that exists somewhere between 'beyond a reasonable doubt' and 'absolute certainty.'" *Ibid.* "Nothing in our cases," Justice O'Connor concluded, "mandates the imposition of this heightened burden of proof at capital sentencing." *Ibid.*

c. Although the Court did not squarely hold in *Franklin* that "residual doubt" was not a constitutionally mandated sentencing factor, this Court noted the following Term that "a majority [in *Franklin*] agreed" that consideration of "residual doubt" was not constitutionally required. *Penry*, 492 U.S. at 320 (citing *Franklin*, 487 U.S. at 173 & n.6 (plurality opinion), and *id.* at 187-188 (O'Connor, J., concurring in the judgment)). Lower courts have repeatedly read *Franklin* at least as broadly. See, *e.g.*, *Darling* v. *State*, 808 So. 2d 145, 162 (Fla.) (citing this Court's "holding" in *Franklin* that "there is no constitutional right to present 'lingering doubt' evidence"), cert. denied, 537 U.S. 848 (2002); *People* v. *Emerson*, 727 N.E.2d 302, 338

(Ill.) (noting that *Franklin* "held that a defendant has no right to present evidence of residual doubt at the second stage of sentencing"), cert. denied, 531 U.S. 930 (2000); *State* v. *Hartman*, 42 S.W.3d 44, 55 (Tenn. 2001) (stating, citing *Franklin*, that this Court "has held that there is no constitutional right to have residual doubt considered as a mitigating factor in a capital sentencing hearing").

2. In holding that respondent was constitutionally entitled to present alibi evidence at the sentencing phase of his trial, the Oregon Supreme Court relied heavily on this Court's decision in *Green* v. *Georgia*, 442 U.S. 95 (1979) (per curiam). *Green*, however, does not suggest that "residual doubt" is a constitutionally mandated sentencing factor in capital proceedings.

In *Green*, the Court reversed a death sentence on the ground that the exclusion of certain hearsay testimony violated due process. 442 U.S. at 97. The evidence at trial indicated that the defendant and his co-defendant had abducted the victim and, "acting either in concert or separately, raped and murdered her." *Id.* at 96. Green sought to introduce, at the sentencing phase (but apparently not at the guilt phase), the testimony of a witness who claimed that the co-defendant had told him that the co-defendant, and not Green, had actually killed the victim. *Ibid.* Although that testimony was admitted against the co-defendant in his earlier trial, it was excluded as hearsay at Green's trial. *Id.* at 97. Relying on *Chambers* v. *Mississippi*, 410 U.S. 284 (1973), the Court concluded that, "[i]n these unique circumstances," application of the hearsay rule violated due process. 442 U.S. at 97.

In so holding, the Court noted that "[t]he excluded testimony was highly relevant to a critical issue in the punishment phase of the trial." *Green*, 442 U.S. at 97.

That single statement certainly does not represent an Eighth Amendment holding that "residual doubt" is a mandatory sentencing factor. The Court did not identify "residual doubt" about guilt as the "critical issue" at the punishment phase, and the better reading of the opinion is that the relevant issue was the defendant's role in, and the circumstances of, the offense. The testimony at issue in *Green* suggested that Green had not directly killed the victim himself; it did not suggest, however, that Green was not legally accountable (*i.e.*, not guilty) of the murder under accomplice-liability principles. If Green had been charged with and convicted of directly committing the murder himself, the testimony would have tended to prove that he was innocent—and thus would have constituted evidence bearing on "residual doubt." But if Green had been convicted of committing felony murder (or of aiding and abetting in the commission of the murder), the testimony would have tended to prove only that he had a minor role in the offense—and thus would have constituted mitigating evidence relevant to the circumstances of the offense.[7] This Court appears to have assumed that Green had been convicted, at least in the alternative, on the latter theory. See *id.* at 96 (noting that the evidence tended to show that defendant, "acting either in concert or separately," raped and murdered the victim).[8]

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[7] Then, as now, Georgia law permitted imposition of the death penalty for felony murder (and for aiding and abetting in the commission of a murder). See Ga. Code Ann. §§ 26-801, 26-1101 (1972).

[8] Similarly, in the decision under review in *Green*, the Georgia Supreme Court acknowledged that whether a defendant's participation in a murder committed by another person was "relatively minor" could be a "mitigating circumstance," but rejected Green's

That reading of *Green* is confirmed by the fact that, after making the statement quoted above, the Court cited not only the plurality opinion from *Lockett*, but also Justice Blackmun's concurring opinion. *Green*, 442 U.S. at 97. In the cited portion of that opinion, Justice Blackmun endorsed the limited proposition that it was unconstitutional to impose the death penalty on a defendant "who only aided and abetted a murder, without permitting any consideration * * * of the extent of her involvement, or the degree of her *mens rea*, in the commission of the homicide." *Lockett*, 438 U.S. at 613 (opinion concurring in part and concurring in the judgment).[9] The Court's citation of Justice Blackmun's concurring opinion would have made no sense if Green had been convicted simply of committing the murder himself, because Justice Blackmun's opinion addressed only the situation in which a defendant had aided and abetted in a murder committed by another, as in the case of felony murder. To the extent that *Green*—which was explicitly decided only on due-process grounds—could be said to have held anything about the Eighth Amendment, therefore, it stands only for the now-settled proposition that evidence that a defendant played a minor role in the offense constitutes relevant evidence of "the circumstances of the offense" for mitigation purposes—not for the novel proposition

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contention on the facts that the testimony demonstrated that his role in the offense was in fact minor. See *Green* v. *State*, 249 S.E.2d 1, 9-10 (Ga. 1978).

[9] In *Tison* v. *Arizona*, 481 U.S. 137 (1987), the Court subsequently upheld the constitutionality of imposing the death penalty in a felony-murder case on the basis of "major participation in the felony committed, combined with reckless indifference to human life." *Id.* at 158.

that evidence that contradicts a finding of guilt must be considered at the sentencing phase.[10]

C. There Is No Sound Justification For A Rule That "Residual Doubt" Is A Constitutionally Mandated Sentencing Factor

Finally, this Court should refuse to adopt an unprecedented constitutional rule that a capital defendant is entitled at sentencing to present evidence or argument pertaining to "residual doubt" because such a rule would improperly permit a jury, at its discretion, effectively to apply a higher standard of proof in capital cases than the "reasonable doubt" standard applied in all other criminal cases.

As a practical matter, because "residual doubt" must mean something less than a "reasonable doubt," it must amount to an unreasonable or irrational doubt—that is, a doubt based on speculation, surmise, or subjective intuition, rather than fact. Cf. *Victor* v. *Nebraska*, 511 U.S. 1, 17 (1994) ("A fanciful doubt is not a reasonable doubt.").[11] One court of appeals defined the concept of "residual doubt" thus: "There may be no *reasonable* doubt—doubt based upon reason—and yet some *genuine* doubt exists. It may reflect a mere possibility; it may be but the whimsy of one juror or several."

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[10] The opinions in *Franklin* further confirm this reading of *Green*. Neither the plurality opinion nor Justice O'Connor's concurring opinion in *Franklin* so much as cited *Green*—as one would naturally expect if the *Green* Court had in any way suggested that "residual doubt" was a constitutionally mandated sentencing factor.

[11] On the other hand, if "residual doubt" does not mean something less than a "reasonable doubt," its only role would be to allow the jury at the sentencing phase to second-guess the determination of the jury at the guilt phase. See p. 19 note 5, *supra*.

Smith v. *Balkcom*, 660 F.2d 573, 580 (5th Cir. 1981), cert. denied, 459 U.S. 882 (1982). A "mere possibility" or "whimsy" standard, however, cannot serve as a sensible basis for a jury to act.

In addition, the "reasonable doubt" standard has long been understood as "the most exacting standard of proof," Erik Lillquist, *Absolute Certainty and the Death Penalty*, 42 Am. Crim. L. Rev. 45, 51 (2005) (Lillquist), and "proof beyond a reasonable doubt" has been defined as "proof that leaves [the jury] firmly convinced of the defendant's guilt," Federal Judicial Center, *Pattern Criminal Jury Instructions* 28 (1988); cf. *Victor*, 511 U.S. at 27 (Ginsburg, J., concurring in part and concurring in the judgment) (citing pattern instruction with approval). Injecting an additional, amorphous "residual doubt" standard into capital sentencing would likely foster jury confusion and invite speculation about whether absolute certainty is required for a verdict—a standard that could well be thought to be unattainable.

Even assuming that some higher standard of proof short of absolute certainty were susceptible of precise articulation, however, there is no justification for a constitutional rule that would permit a jury to deviate from the "reasonable doubt" standard. That venerable standard dates from the founding of the Republic, see Anthony A. Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U. L. Rev. 507, 516-518 (1975) (tracing standard to Boston Massacre trials), and appears to have been developed precisely to guarantee that only the truly guilty were subjected to the death penalty, which was then available for most felonies, see Lillquist, *supra*, 42 Am. Crim. L. Rev. at 51; *Blakely* v. *Washington*, 124 S. Ct.

2531, 2559 (2004) (Breyer, J., dissenting).[12] The reasonable-doubt standard is designed to permit the criminal-justice system to provide strong protection for a defendant's interests without imposing a paralyzing requirement of absolute certainty. See *Victor*, 511 U.S. at 13-14. Assuming *arguendo* that there were some reason to believe that juries in capital cases were convicting defendants despite genuine doubts that defendants were guilty, the proper solution would be to ensure that juries are properly instructed about "reasonable doubt" at the guilt phase—not to require that juries be allowed, at their discretion, to take unreasonable or irrational doubts into account at the sentencing phase.[13] A system that allowed juries—or even a single juror, see *Mills*, 486 U.S. at 384—to invent and then apply a higher standard of proof for capital sentences would "highlight that the standard of proof in other criminal cases is lower, and thereby lead to less

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[12] It was only later that the "reasonable doubt" standard came to be used in other criminal cases, see Lillquist, *supra*, 42 Am. Crim. L. Rev. at 51, and to be formally adopted by this Court as the minimum standard required in criminal cases by due process, see *In re Winship*, 397 U.S. 358, 364 (1970); cf. *Davis* v. *United States*, 160 U.S. 469, 493 (1895) (holding, with regard to insanity defense in capital-murder case, that "[n]o man should be deprived of his life * * * unless the jurors who try him are able, upon their consciences, to say that the evidence before them, by whomsoever adduced, is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged").

[13] This Court has held that a jury need not be given an instruction specifically defining "reasonable doubt," see *Victor*, 511 U.S. at 5, but has invalidated an instruction that defined "reasonable doubt" as "such doubt as would give rise to a grave uncertainty" and "an actual substantial doubt," *Cage* v. *Louisiana*, 498 U.S. 39, 40 (1990) (per curiam) (quoting jury instruction) (emphasis omitted).

respect for guilty verdicts in noncapital cases," Lillquist, *supra*, 42 Am. Crim. L. Rev. at 67.

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In *Lockhart* v. *McCree*, *supra*, this Court noted, quoting the dissenting opinion below, that "residual doubt has been recognized as an extremely effective argument for defendants in capital cases." 476 U.S. at 181 (quoting *Grigsby* v. *Mabry*, 758 F.2d 226, 248 (8th Cir. 1985) (opinion of Gibson, J.)). In fact, studies have reached somewhat conflicting results on the efficacy of relying on "residual doubt."[14] Nevertheless, if States wish to authorize the practice of considering "residual doubt" as a sentencing factor in capital proceedings, they can of course do so—as a number of States have

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[14] Compare, *e.g.*, William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 Am. J. Crim. L. 1, 28 (1988) (concluding, in study of jurors in ten cases in State that did not allow consideration of "residual doubt" as a sentencing factor, that "[t]he existence of [either 'reasonable' or 'residual'] doubt about the guilt of the accused was the most often recurring explanatory factor" in cases in which the jury recommended life), with Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse and the Death Penalty*, 83 Cornell L. Rev. 1557, 1577 (1998) (concluding, in study of jurors in 17 cases in which the defendant denied guilt, that "residual doubt" strategy "may actually increase the likelihood that the jury will reach a sentence of death," except to the extent that it suggests that the defendant played a minor role in a murder involving multiple actors); cf. William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 Cornell L. Rev. 1476, 1527 (1998) (noting that, in some cases, "jurors with some doubts, possibly reasonable doubts, about a capital murder verdict * * * may have agreed to vote guilty of capital murder in exchange for an agreement with [other] jurors to abandon the death penalty").

done.[15] The Eighth Amendment, however, permits States to confine consideration of guilt and innocence to the guilt phase and to require the sentencer to focus on other considerations at the sentencing phase. Because the Eighth Amendment does not require further consideration of "residual doubt" once a defendant has been convicted on proof beyond a reasonable doubt, the Oregon Supreme Court's decision was erroneous.

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[15] No State has adopted statutory language that expressly allows a jury to take "residual doubt" into account at sentencing. Cf. Model Penal Code § 210.6(1)(f) (Proposed Official Draft 1962) (prohibiting the imposition of the death penalty where, "although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt"). However, courts in seven States (Arizona, California, Georgia, Indiana, Missouri, Oklahoma, and Tennessee) have authoritatively construed their capital sentencing statutes to require consideration of "residual doubt." On the other hand, nine States (Florida, Illinois, Montana, Nebraska, New Jersey, Ohio, Oregon, Virginia, and Wyoming) have capital sentencing statutes that foreclose, or have been authoritatively construed to foreclose, consideration of "residual doubt." The remaining 22 States with capital punishment have statutes that could arguably be read to allow consideration of "residual doubt" but have not yet been authoritatively construed by the courts. (Courts in some of those States have implicitly sanctioned the consideration of "residual doubt" by evaluating counsel's effectiveness (or ineffectiveness) in choosing to pursue (or not to pursue) a "residual doubt" strategy at sentencing; courts in other of those States have arguably precluded the consideration of "residual doubt" by holding that there is no federal constitutional right to its consideration, without separately addressing whether there is a similar right under state law.) A list of relevant statutes and cases is set forth in an appendix to this brief.

CONCLUSION

The judgment of the Oregon Supreme Court should be vacated, and the case remanded for further proceedings.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

JOHN C. RICHTER
Acting Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

KANNON K. SHANMUGAM
Assistant to the Solicitor General

ROBERT J. ERICKSON
Attorney

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APPENDIX

STATE LAW ON "RESIDUAL DOUBT"

Alabama: Ala. Code § 13A-5-52 (2004) ("[M]itigating circumstances shall include * * * any other relevant mitigating circumstance which the defendant offers as a basis for life imprisonment without parole instead of death."); *Melson* v. *State*, 775 So. 2d 857, 898-899 (Ala. Crim. App. 1999) (federal law provides no right to demand jury consideration of residual doubt).

Arizona: 2005 Ariz. Legis. Serv. ch. 325(G) (West) ("The trier of fact shall consider as mitigating circumstances any factors proffered by the defendant or the state that are relevant in determining whether to impose a sentence less than death."); *State* v. *Jones*, 4 P.3d 345, 369 (Ariz. 2000) (state law allows argument on residual doubt).

Arkansas: Ark. Code Ann. § 5-4-602(4) (West 2005) ("[M]itigation evidence must be relevant to the issue of punishment."); *Id.* § 5-4-603(a)(3) (the jury, in addition to weighing the mitigating and aggravating factors, must find that "aggravating circumstances justify a sentence of death beyond a reasonable doubt"); *Ruiz* v. *State*, 772 S.W.2d 297, 308 (Ark. 1989) (federal law provides no right to demand jury instruction on residual doubt).

California: Cal. Penal Code § 190.3(k) (West 2005) ("In determining the penalty, the trier of fact shall take into account * * * [a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."); *People* v. *Musselwhite*, 954 P.2d 475, 510 (Cal. 1998) (state law allows defendant to argue and present evidence on

residual doubt, although he is not entitled to a jury instruction on it).

Colorado: Colo. Rev. Stat. Ann. § 18-1.3-1201(4)(l) (West 2005) (mitigating factors include "[a]ny other evidence which in the court's opinion bears on the question of mitigation").

Connecticut: Conn. Gen. Stat. Ann. § 53a-46a(d) (West 2005) (trier of fact "shall first determine whether a particular factor concerning the defendant's character, background or history, or the nature and circumstances of the crime, has been established by the evidence, and shall determine further whether that factor is mitigating in nature, considering all the facts and circumstances of the case"); *State* v. *Breton*, 824 A.2d 778, 838-839 & n.65 (Conn. 2003) (state law apparently allows for residual doubt because it was submitted to the jury as one of the mitigating factors).

Delaware: Del. Code Ann. tit. 11, § 4209(c) (2005) (no list of mitigating circumstances); *Shelton* v. *State*, 744 A.2d 465, 495-497 (Del. 2000) (federal law provides no right to residual doubt, but state law allows defendant to discuss or argue in allocution facts already in evidence either in the guilt or penalty phase, as well as in some circumstances to present at the penalty phase new evidence relating to the circumstances of the crime).

Florida: Fla. Stat. Ann. § 921.141(2)(c) (West 2005) (jury not only weighs the factors, but separately determines whether "[b]ased on these considerations, * * * the defendant should be sentenced to life imprisonment or death"); *Aldridge* v. *State*, 503 So. 2d 1257, 1259 (Fla. 1987) (residual doubt is not a mitigating factor under state law).

Georgia: Ga. Code Ann. § 17-10-30 (2005) (trier may consider "any mitigating circumstances or aggravating circumstances otherwise authorized by law"); *Taylor* v. *State*, 404 S.E.2d 255, 262 (Ga. 1991) (state law allows argument on residual doubt, but does not require a jury instruction on it); *Romine* v. *State*, 350 S.E.2d 446, 453 (Ga. 1986) (noting that "evidence relating to guilt or innocence is relevant to sentence").

Idaho: 2005 Idaho Sess. Laws ch. 152 (no list of mitigating factors); *State* v. *Hairston*, 988 P.2d 1170, 1191 (Idaho 1999) (trial court apparently not required to consider lingering doubt under state law because the question was already determined by the jury during the guilt phase).

Illinois: 720 Ill. Comp. Stat. Ann. 5/9-1(c) (West 2005) (list of mitigating factors is not exclusive); *People* v. *McDonald*, 660 N.E.2d 832, 847-848 (Ill. 1995) (residual doubt is not allowed under state law).

Indiana: Ind. Code Ann. § 35-50-2-9(c) (West 2005) (mitigating factors include "[a]ny other circumstances appropriate for consideration"); *Dye* v. *State*, 717 N.E.2d 5, 21-22 (Ind. 1999) (residual doubt is allowed under state law because court considered evidence and decided there was not residual doubt).

Kansas: Kan. Stat. Ann. § 21-4626 (2005) (list of mitigating circumstances is not exhaustive).

Kentucky: Ky. Rev. Stat. Ann. § 532.025(2) (West 2005) (jury can consider "any mitigating circumstances * * * otherwise authorized by law * * * which may be supported by the evidence"); *Bussell* v. *Commonwealth*, 882 S.W.2d 111, 115 (Ky. 1994) (federal law provides no right to consider residual doubt as a mitigating circumstance).

Louisiana: La. Code Crim. Proc. Ann. art. 905.5(h) (West 2005) (jury may consider "[a]ny other relevant mitigating circumstance").

Maryland: Md. Code Ann., Crim. Law § 2-303(h)(2)(viii) (West 2005) (mitigating circumstances include "any other fact that the court or jury specifically sets forth in writing as a mitigating circumstance in the case"); *Hunt* v. *State*, 583 A.2d 218, 247 (Md. 1990) (federal law provides no right to have sentencing jury consider residual doubt).

Mississippi: Miss. Code Ann. § 99-19-101(6) (2005) (list of relevant mitigating factors is exhaustive); *Holland* v. *State*, 705 So. 2d 307, 325-327 (Miss. 1997) (federal law allows for argument, but not an instruction or evidence, on residual doubt).

Missouri: Mo. Rev. Stat. § 565.030(4)(4) (2005) (even after doing the weighing, trier can decide "under all of the circumstances not to assess and declare the punishment at death"); *Id.* § 565.035.3(3) (court shall consider "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and the defendant"); *State* v. *Chaney*, 967 S.W.2d 47, 59-60 (Mo. 1998) (state statute requires sentencing court to consider the strength of the evidence in determining whether the death penalty is excessive or disproportionate to other cases); *Jones* v. *State*, 784 S.W.2d 789, 793 (Mo. 1990) (state law appears to allow for residual doubt because defendant asserted that counsel was incompetent for failing to seek an instruction on it and court did not state that such a strategy was wrong, only that counsel was not ineffective).

Montana: Mont. Code Ann. § 46-18-304(2) (2005) ("The court may consider any other fact that exists in mitigation of the penalty."); *Gollehon* v. *State*, 986 P.2d 395, 400 (Mont. 1999) (residual doubt is not an appropriate mitigating factor under state law).

Nebraska: Neb. Rev. Stat. § 29-2523 (2005) (list of mitigating circumstances is exhaustive).

Nevada: Nev. Rev. Stat. § 175.554 (2005) (no list of mitigating circumstances); *Middleton* v. *State*, 968 P.2d 296, 313 (Nev. 1998) (federal law provides no right to an instruction on residual doubt).

New Hampshire: N.H. Rev. Stat. Ann. § 630:5IV (2005) ("The jury, regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence and the jury shall be so instructed.").

New Jersey: N.J. Stat. Ann. § 2C:11-3(5)(h) (West 2005) (list of mitigating circumstances is exhaustive); *State* v. *Josephs*, 803 A.2d 1074, 1116-1117 (N.J. 2002) (residual doubt is not a mitigating circumstance under state law).

New Mexico: N.M. Stat. Ann. § 31-20A-6 (West 2005) (list of mitigating factors is not exhaustive); *Id.* § 31-20A-2(B) (trier, in addition to weighing the mitigating and aggravating circumstances, "consider[s] both the defendant and the crime").

New York: N.Y. Crim. Proc. Law § 400.27(9)(f) (McKinney 2005) ("Any other circumstance concerning the crime * * * that would be relevant to mitigation or punishment for the crime."); *Id.* § 400.27(11)(a) (jury, in addition to weighing the aggravating and mitigating factors, must "unanimously determine[] that the penalty of death should be imposed"); *People* v. *Harris*,

676 N.Y.S.2d 440, 443 (N.Y. Sup. Ct. 1998) (federal law provides no right to residual doubt as a mitigating factor).

North Carolina: N.C. Gen. Stat. Ann. § 15A-2000(9) (West 2005) ("Any other circumstance arising from the evidence which the jury deems to have mitigating value."); *State* v. *Hill*, 417 S.E.2d 765, 778-779 (N.C. 1992) (federal law provides no right to residual doubt as a mitigating circumstance).

Ohio: Ohio Rev. Code Ann. § 2929.04(7) (West 2005) ("Any other factors that are relevant to the issue of whether the offender should be sentenced to death."); *State* v. *McGuire*, 686 N.E.2d 1112, 1122-1123 (Ohio 1997) (defendant is not entitled to an instruction on residual doubt under state law although, in the past, residual doubt could be a mitigating factor).

Oklahoma: Okla. Stat. Ann. tit. 21, § 701.10(c) (West 2005) (no list of mitigating circumstances); *Cummings* v. *State*, 968 P.2d 821, 838 (Okla. Crim. App. 1998) (state law allows for consideration of residual doubt evidence).

Oregon: Or. Rev. Stat. § 163.150(c)(A) (2005) (list of mitigating circumstances is not exhaustive); Pet. App. 52 (residual doubt is not a mitigating circumstance under state law).

Pennsylvania: 42 Pa. Cons. Stat. Ann. § 9711(e)(8) (West 2005) ("Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense."); *Commonwealth* v. *Meadows*, 787 A.2d 312, 320-321 (Pa. 2001) (state law apparently allows for residual doubt because court approved of trial counsel's decision to strategically rely on residual doubt).

South Carolina: S.C. Code Ann. § 16-3-20(c) (2005) ("[T]he judge shall consider, or he shall include in his instructions to the jury for it to consider, mitigating circumstances otherwise authorized or allowed by law."); *State* v. *Southerland*, 447 S.E.2d 862, 868 (S.C. 1994) (federal law provides no right to residual doubt as a mitigating factor).

South Dakota: S.D. Codified Laws § 23A-27A-1 (2005) (no list of mitigating factors); *State* v. *Moeller*, 616 N.W.2d 424, 457-458 & 465 n.18 (S.D. 2000) (state law apparently allows for residual doubt because defense counsel sought an instruction including residual doubt as one of the factors and it was denied, but there was no discussion that residual doubt is not a mitigating factor).

Tennessee: Tenn. Code Ann. § 39-13-204(j)(9) (2005) ("Any other mitigating factor which is raised by the evidence produced by either the prosecution or defense at either the guilt or sentencing hearing."); *State* v. *Thomas*, 158 S.W.3d 361, 403 (Tenn. 2005) (residual doubt is a non-statutory mitigating circumstance under state law).

Texas: Tex. Crim. Code Ann. art. 37.071(d)(1) (West 2005) (jury "shall consider all evidence admitted at the guilt or innocence stage and the punishment stage."); *Blue* v. *State*, 125 S.W.3d 491, 502-503 (Tex. Crim. App. 2003) (court noted in dicta that defendant had the opportunity to argue residual doubt and that there was no claim that he was prevented from presenting any evidence, notwithstanding that *Franklin* is controlling with regard to jury-instruction issue).

Utah: Utah Code Ann. § 76-3-207(4)(g) (2005) ("Any other fact in mitigation of the penalty."); *Id.* § 76-3-

207(5)(b) (death penalty is only imposed if, after weighing the factors, the jury "is further persuaded, beyond a reasonable doubt, that the imposition of the death penalty is justified and appropriate in the circumstances"); *State* v. *Young*, 853 P.2d 327, 365 (Utah 1993) (federal law provides no right to an instruction on residual doubt).

Virginia: Va. Code Ann. § 19.2-264.4(B) (2005) (list of mitigating factors is not exhaustive); *Frye* v. *Commonwealth*, 345 S.E.2d 267, 283 (Va. 1986) (residual doubt cannot be argued and no evidence on residual doubt is permitted under state law).

Washington: Wash. Rev. Code § 10.95.070 (2005) (list is not exhaustive); *In re Personal Restraint of Lord*, 868 P.2d 835, 857 n.13 (Wash. 1994) (state law does not appear to preclude the possibility of residual doubt as a mitigating factor in jury instructions).

Wyoming: Wyo. Stat. Ann. § 6-2-102(j)(viii) (2005) (list of mitigating factors is exhaustive).

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In The

Supreme Court of the United States

STATE OF OREGON,

Petitioner,

v.

RANDY LEE GUZEK,

Respondent.

On Writ Of Certiorari To The Oregon Supreme Court

BRIEF FOR RESPONDENT RANDY LEE GUZEK

J. KEVIN HUNT, ESQ.
PMB No. 167
19093 S. Beavercreek Rd.
Oregon City, Oregon 97045
Tel. (503) 650-7782

RICHARD L. WOLF, ESQ.
Counsel of Record
12940 N.W. Marina Way
Portland, Oregon 97231
Tel. (503) 384-0910

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Respondent Guzek rejects Petitioner's "Question Presented," because this case does not involve "residual" or "lingering" doubt, but rather presents the following question:

"Should the writ of certiorari be dismissed as improvidently granted for want of jurisdiction, or, should a question be certified to the Oregon Supreme Court concerning application of Or. Rev. Stat. § 138.012 to Respondent's mother's testimony, where remand or certification of such question will confirm the Oregon Supreme Court's plainly erroneous reading of the trial court record and will reveal that there is no live *federal*-law case or controversy because *state* law entitles Mr. Guzek to all the relief he received below, thus making any ruling by this Court on the merits entirely advisory in nature?"

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STATEMENT OF THE CASE

Mr. Guzek presents this Statement of the Case to apprise the Court of salient facts omitted from Petitioner's brief. These facts demonstrate that the Court lacks jurisdiction and that the issue of 'residual doubt' was not put in issue by Mr. Guzek, the State of Oregon or the Oregon Supreme Court's decision.

In a 1988 bifurcated trial, Respondent Guzek was convicted of two counts of aggravated murder and sentenced to death by an Oregon jury. That jury heard prosecution testimony in both trial phases from his codefendants, Mark Wilson and Donald Cathey, that Mr. Guzek was the mastermind of the murders, ringleader of the trio, and the most morally culpable for the double homicide who accordingly deserved to die.[1] The codefendants received life sentences with a possibility of parole in exchange for testifying against Mr. Guzek. That jury also heard testimony at the guilt-innocence phase, offered to establish alibi, from Mr. Guzek's grandfather, that Respondent was with him from 9:00 p.m. until 2:00 a.m. and from Mr. Guzek's mother that Respondent was asleep at her house from 2:16 a.m. until 4:30 a.m., thereby accounting for Respondent's whereabouts preceding and during the commission of the double murder which occurred in the early morning hours of June 28, 1987. (J.A. 36-37, 67-68). As mandated by a provision of Oregon's capital sentencing statutory scheme – Or. Rev. Stat. § 163.150(1)(a) – the jury was instructed "that all evidence previously offered and

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[1] Tr. 9/26/1997 at 236; Tr. 11/3/1997 at 46; Tr. 11/4/1997 at 18; Tr. 11/4/1997 at 33.

received [during the guilt-innocence phase] may be considered for purposes of the sentencing hearing."

In 1990, the Oregon Supreme Court affirmed Mr. Guzek's convictions but vacated his death sentences, finding unconstitutional as applied the Oregon capital sentencing statute in place during the 1988 trial, which was modeled on the Texas statute at issue in *Penry v. Lynaugh*, 492 U.S. 302 (1989). *See Wagner v. Oregon*, 492 U.S. 914 (1989), *on remand*, *State v. Wagner*, 309 Or. 5, 786 P.2d 93 (1990); *State v. Guzek*, 310 Or. 299, 797 P.2d 1031 (1990) ("*Guzek I*"). Mr. Guzek's 1991 penalty phase retrial, employing a new "fourth question" added to allow the jury to fully consider *all mitigating evidence*, resulted in another death sentence. In 1995, the Oregon Supreme Court vacated that death sentence because the trial court had admitted aggravating evidence that was irrelevant to the statutory capital sentencing special verdict questions jurors were required to answer in Mr. Guzek's 1991 sentencing trial. *State v. Guzek*, 322 Or. 245, 906 P.2d 272 (1995) (*Guzek II*). Before the 1997 penalty-only retrial, Mr. Guzek's grandfather died. At both the 1991 and 1997 penalty phase retrials, the codefendants refused to testify.

In the interval between the original 1988 bifurcated aggravated murder/capital sentencing trial and the 1997 re-sentencing proceeding, the codefendant accusers made numerous oral and written statements that greatly undermined their original 1988 trial testimony accusing Mr. Guzek of being the ringleader of the crimes for which they were all convicted. These subsequent statements by the codefendant accusers included express recantations of prior testimony about Mr. Guzek's purported ringleader status, statements that they would now "tell the truth" about the circumstances of the offense if they testified

again, and statements that they would refuse to so testify because they feared that if they told the truth in the retrial, the prosecutor would void their life-saving plea agreements and seek the death penalty against them. (J.A. 103-07).

During the 1997 retrial, the prosecution offered, pursuant to Or. Rev. Stat. § 138.012, the codefendants' prior recorded testimony from the original 1988 trial, which the trial court admitted in evidence by having police cadet surrogates read it to the jury.[2] Mr. Guzek sought to impeach the codefendants' prior recorded testimony with, *inter alia*, the live testimony of his mother and the prior

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[2] Or. Rev. Stat. § 138.012 provides in relevant part that:

"(2)(a) If a reviewing court finds prejudicial error in the sentencing proceeding only, the court may set aside the sentence of death and remand the case to the trial court. No error in the sentencing proceeding results in reversal of the defendant's conviction for aggravated murder. Upon remand, and at the election of the state, the trial court shall either:

(2)(A) * * *

(2)(B) Impanel a new sentencing jury for the purpose of conducting a new sentencing proceeding to determine if the defendant shall be sentenced to:

(i) Death;

(ii) Imprisonment for life without the possibility of release or parole; or

(iii) Imprisonment for life [with the possibility of parole].

(2)(b) The new sentencing proceeding is governed by the provisions of ORS 163.150(1), (2), (3) and (5). A transcript of all testimony and all exhibits and other evidence properly admitted in the prior trial and sentencing proceeding are admissible in the new sentencing proceeding. Either party may recall any witness who testified at the prior trial or sentencing proceeding and may present additional relevant evidence."

recorded testimony of his deceased grandfather from the 1988 trial regarding Mr. Guzek's whereabouts on the night of the murders. (J.A. 108-09). The trial court refused to permit both the mother's and grandfather's 'alibi testimony'[3] and also excluded eight other items of impeachment evidence, including the codefendants' post-1988 recantations. (J.A. 103-08). The 1997 jury again returned sentences of death.

On direct review of the 1997 death sentences by the Oregon Supreme Court, Petitioner Oregon acknowledged reversible error mandating another penalty retrial, because of the trial court's refusal to instruct the sentencing jury that it could return a sentence of life without possibility of parole. That acknowledgement and the Oregon high court's resulting decision rested entirely on state law and thus will not be disturbed regardless of the resolution of Petitioner's claims before this Court. *State v. Guzek*, 336 Or. 424, 426, 86 P.3d 1106, 1108 (2004) (*Guzek III*); App. to Pet. for Cert. at 7.

The Oregon Supreme Court opined on another issue it believed likely to recur on retrial of the penalty phase. It found reversible error in the trial court's refusal to admit the testimony of Mr. Guzek's grandfather and mother and eight other excluded items of impeachment evidence. *Id.* 336 Or. at 447, 86 P.3d at 1119, App. to Pet. for Cert. at 38. Regarding the prior recorded testimony of Mr. Guzek's

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[3] Respondent Guzek places scare quotes around 'alibi evidence' and 'alibi testimony' where those terms refer to the offer of mother and grandfather's testimony in the 1997 penalty retrial, because in that proceeding the testimony at issue was offered for purposes of rebutting and impeaching the state's case for a death sentence and not as evidence of innocence.

grandfather from the 1988 trial, the court held that its admission was required by Or. Rev. Stat. § 138.012, set forth in footnote 2 *ante*, which makes all testimony offered at the original guilt-innocence trial relevant and admissible *per se* in a penalty phase retrial as a matter of state law, by virtue of its having been adduced in the original trial. That statute also permits "either party . . . [to] recall any witness who testified at the prior trial. . . ." *Id.* 336 Or. at 451, 86 P.3d at 1121, App. to Pet. for Cert. at 43-44. The court held:

> The transcript of defendant's grandfather's testimony – like the transcript of any other witness's testimony – was relevant and subject to consideration in the penalty phase, regardless of its substance, because it was "previously offered and received" during the trial on the issue of guilt. Or. Rev. Stat. § 163.150(1)(a); *see also* Or. Rev. Stat. § 138.012(2)(b) (if reviewing court vacates death penalty, transcript of all testimony, all exhibits, and other evidence properly admitted in prior guilt and penalty-phase proceedings deemed admissible in remanded penalty-phase proceeding). The trial court therefore erred in sustaining the state's objection to admission of that evidence.

Guzek III, 336 Or. at 451, 86 P.3d at 1121, App. to Pet. for Cert. at 43-44.

Mr. Guzek's mother, like his grandfather, testified at his original 1988 guilt-innocence trial. (J.A. 60-79). In the proceedings below, however, all members of the Oregon Supreme Court misapprehended the trial court record and mistakenly assumed that Mr. Guzek "did not seek to introduce [his mother's testimony] during the guilt phase" and thus that Mr. Guzek's mother did *not* testify at his

original guilt-innocence trial in 1988. *Guzek III*, 336 Or. at 462, 86 P.3d at 1127, App. to Pet. for Cert. at 60-61. *Accord*, *id.* 336 Or. at 468, 86 P.3d at 1131, App. to Pet. for Cert. at 70 (Gillette, J., dissenting) (mistakenly assuming that "the testimony of defendant's mother . . . had not been previously offered" at the 1988 guilt-innocence trial). *See* pp. 11-14, *post* (further documenting the Oregon Supreme Court's clearly erroneous understanding of the 1988 trial record). As a result, the court below mistakenly concluded that its holding with regard to the grandfather's testimony under Or. Rev. Stat. § 138.012 did not also control the admissibility of the mother's 'alibi testimony' on retrial, and as a result proceeded to analyze the admissibility of her testimony under the Eighth Amendment.

In holding that the Eighth Amendment mandated admission of the mother's 'alibi testimony,' the Oregon Supreme Court majority stated that this was not a 'residual doubt' case, distinguishing the purpose for which the 'alibi testimony' was offered in Mr. Guzek's case from the facts underlying *Franklin v. Lynaugh*, 487 U.S. 164 (1988), in which a plurality of this Court said that the Eighth Amendment does not require capital sentencing jurors to be instructed concerning " 'residual' or 'lingering' doubt" as to a defendant's guilt.[4]

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[4] "We note that, in *Franklin v. Lynaugh* . . . a plurality of the Supreme Court strongly suggested, and the concurrence would have held, that the *Eighth Amendment* does not require an *instruction* that a penalty-phase jury consider any *residual or lingering doubts* remaining from the guilt phase. However, nothing in that decision lessened the direction from *Lockett*, *Bell*, *Eddings*, and *Green* that the *Eighth Amendment does* require that a defendant be permitted to *introduce*, and a jury be able to consider, *mitigating evidence relevant to any circumstances of the offense*, such as evidence that would lessen the

(Continued on following page)

Two Justices dissenting in part agreed that a new sentencing hearing was required under state law. They also accepted the majority's conclusion in regard to the grandfather's testimony that the prior recorded testimony of any witness at the original 1988 guilt-innocence trial is relevant and admissible *per se* under Or. Rev. Stat. § 138.012 precisely because it had been admitted in the original 1988 trial. But, as did the majority, the dissenters misapprehended the trial court record, erroneously presuming the mother did not testify in the original 1988 trial. *See* pp. 11-14 *post*. Accordingly, the dissenters likewise did not apply Or. Rev. Stat § 138.012 in considering the admissibility of the mother's testimony.

Unlike the majority, the dissenters characterized the mother's testimony as "residual doubt evidence" and would have held it inadmissible based on this Court's discussion of the proposed "residual doubt" jury instruction in *Franklin*.

STATEMENT REGARDING THIS COURT'S LACK OF JURISDICTION

For the reasons laid out at pp. 10-19 *post*, this Court is without jurisdiction to hear this case.

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defendant's culpability in the offense. Simply stated, a 'residual' or 'lingering doubt' remaining from the guilt phase, *Franklin*, 487 U.S. at 174, is qualitatively different from actual 'evidence' proffered during the penalty phase." [Internal citations omitted.]

Guzek III, 336 Or. at 463, n. 30, 86 P.3d at 1128, n. 30, App. to Pet. for Cert. at 62-63 (emphasis in original).

SUMMARY OF ARGUMENT

A sentencing retrial will occur regardless of how this Court resolves the issues before it. At that re-sentencing proceeding, the trial court will be obliged to admit the testimony of Mr. Guzek's mother as a matter of *state* law, again regardless of how this Court resolves the federal-law issue on which it granted certiorari. Any decision the Court might render on the federal-law issue accordingly would be advisory and beyond the Court's jurisdiction.

In a portion of the Oregon Supreme Court decision below that is not under review by this Court, the Oregon Supreme Court ordered the trial court on re-sentencing to admit the testimony of Mr. Guzek's grandfather. In so doing, the Oregon high court expressly directed the trial court that "[t]he transcript of defendant's grandfather's testimony – *like the transcript of any other witness's testimony* – was relevant and subject to consideration in the penalty phase, *regardless of its substance*, because it was *'previously offered and received' during the trial on the issue of guilt*." *Guzek III*, 336 Or. at 451, 86 P.3d at 1121, App. to Pet. for Cert. at 43-44. This state-law directive makes the testimony of Mr. Guzek's mother equally "relevant and subject to consideration" in the upcoming retrial of the penalty phase because the testimony of Mr. Guzek's mother, like that of his grandfather, "was 'previously offered and received' during [Mr. Guzek's 1988] trial on the issue of guilt." (J.A. 60-79.)

The reason the Oregon Supreme Court did not expressly extend that state-law holding to Mr. Guzek's mother as well as his grandfather – both of whose testimony is similar in substance – is because the Oregon Supreme Court made a clear mistake of ineluctable fact about the prior proceedings. Although Mr. Guzek's mother

testified at the 1988 trial on the issue of alibi (J.A. 60-79), all members of the Oregon Supreme Court erroneously thought that she had *not* testified – *i.e.*, that Mr. Guzek "did *not* seek to introduce [his mother's testimony] during the guilt phase." *Guzek III*, 336 Or. at 462, 86 P.3d at 1127, App. to Pet. for Cert. at 60-61 (emphasis added). It was only because of this mistaken belief that there was a procedural "difference" between the proposed retrial testimony of Mr. Guzek's grandfather and that of his mother that the Oregon Supreme Court considered whether there was a federal-law basis for admitting the mother's testimony.

Oregon, the losing party below, did not seek rehearing or clarification of the Oregon Supreme Court's mistake, instead seeking review by this Court. But notwithstanding anything that occurs in this Court, when the case goes back for re-sentencing, the trial judge will *not* be under the same misapprehension about the record of its prior proceedings, and instead will be under the Oregon Supreme Court's directive to permit the jury to hear and consider "*any* . . . witness's testimony" – including the mother's – that "was 'previously offered and received' during the trial on the issue of guilt." Because any decision by this Court on a federal question will have no effect on the ongoing proceedings in the case, any decision the Court might render would be entirely advisory in nature and thus outside the Court's limited jurisdiction to hear "case[s] and controvers[ies]." The Court should dismiss the writ of certiorari as improvidently granted or certify a question or remand the case to the Oregon Supreme Court for clarification.

In any event, there is no federal-law basis for overturning the ruling below – that the jury should be permitted to hear the prior testimony of Mr. Guzek's mother.

Whether admitted as impeachment or as substantive evidence, the mother's proffered testimony is relevant *per se* as a matter of state statutory law. The trial court's refusal to admit the testimony at issue thus precluded Mr. Guzek from introducing evidence material to the jury's determination of his culpable mental state and to other circumstances of the offense that militate against a death sentence, in violation not only of state law but also of the Eighth Amendment and the Fourteenth Amendment Due Process Clause.

ARGUMENT

I

This Court is without jurisdiction to hear this case because no federal case or controversy is properly before the Court, and any decision the Court renders will be purely advisory and have no effect on the remaining proceedings and outcomes in the case.

Certiorari was improvidently granted because no federal question is properly before this Court. This is because at his impending retrial, Mr. Guzek is entitled *as a matter of state law* to all of the relief granted to him below, without reference to any of the Oregon Supreme Court's *dicta* in regard to the Eighth Amendment. Thus, adequate Oregon statutory law requires the admission of Mr. Guzek's 'alibi evidence' in his upcoming sentencing trial *independently* of any decision by the court below or by this Court as to whether admission of such evidence is required as well under the federal Constitution. Therefore, any judgment by this Court concerning that issue would

be contrary to U.S. Constitution Article III, to 28 U.S.C. § 1257, and to this Court's jurisprudence prohibiting the rendering of "advisory opinions."[5]

The Oregon Supreme Court expressly directed the trial court on retrial, pursuant to Or. Rev. Stat. § 138.012, to treat as relevant and admissible *per se* the prior testimony of "*any*" witness who testified at Mr. Guzek's 1988 guilt-innocence trial.[6] Because Mr. Guzek's mother testified at his 1988 guilt-innocence trial, this directive makes her testimony, as well as the grandfather's, *per se* relevant and admissible at Mr. Guzek's impending re-sentencing trial. The only reason the Oregon Supreme Court did not expressly apply the same reasoning to the mother's testimony, and instead went on to address the Eighth Amendment issue on

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[5] There is a second reason the Court has no jurisdiction here, that Petitioner Oregon did not argue below that the testimony at issue was inadmissible by virtue of constituting "residual" or "lingering doubt" evidence. In its brief on direct review before the Oregon Supreme Court, Petitioner Oregon simply asserted that the 'alibi evidence' was "irrelevant," never once invoking the words "residual," or "lingering doubt," or this Court's holding in *Franklin* or any other case from this Court. That portion of Petitioner's brief in the state court is set forth as Respondent's Appendix 1.

[6] *See, Guzek III*, 336 Or. at 451, 86 P.3d at 1121, App. to Pet. for Cert. at 43-44 (stating that, on re-sentencing, "[e]ither party may recall any witness who testified at the prior trial or sentencing proceeding. . . "). Thus, Or. Rev. Stat. § 138.012(2)(b) makes no distinction between available and unavailable witnesses in rendering their prior testimony admissible in a penalty phase retrial. Nor does it distinguish between prior recorded testimony and live testimony by a witness who previously testified in either phase of a bifurcated trial. Because Mr. Guzek's mother is available, Or. Evid. Code 804 and Or. Rev. Stat. § 138.012(2)(b) may create a preference for producing her in person to reiterate her previously sworn testimony, thus enabling the re-sentencing jury to observe her demeanor. In any event, the form of the testimony admitted on retrial is a matter for the trial court to resolve in its discretion, and is not in issue in this case.

which this Court granted certiorari, is because all members of the Oregon Supreme Court mistakenly believed that mother had *not* testified at the original 1988 trial.

The Oregon Supreme Court majority and dissenting opinions in this case make clear that all participating members of that court erroneously assumed that Mr. Guzek's mother had *not* previously testified in the original 1988 trial. The majority said it was reviewing the admissibility of the grandfather's and mother's 'alibi evidence' under separate analytical bases "[b]ecause the analysis of their relevance is different . . . " *Guzek III*, 336 Or. at 451, 86 P.3d at 1121, App. to Pet. for Cert. at 43. The court did not, however, explain in this passage, why it thought "their relevance [was] different." That difference cannot be based on the content of the grandfather's and mother's testimony because the content was identical. The crime occurred in the early morning hours of June 28, 1987. The grandfather's testimony was entirely about Mr. Guzek's whereabouts during the *earlier* part of that period, from 9:00 p.m. on June 27th to 2 a.m. on June 28th. The mother's testimony was entirely about Mr. Guzek's whereabouts during the *later* part of that period, from 2:16 a.m. to 4:30 a.m. Thus, whatever made the grandfather's testimony relevant as a matter of state law under Or. Rev. Stat. § 138.012 also made the mother's testimony relevant under Or. Rev. Stat. § 138.012 – assuming (as is true, *see* J.A. 60-79) that such testimony by both witnesses was presented at the original 1988 trial.

Later in its opinion, the Oregon Supreme Court made clear why it treated identical kinds of testimony as statutorily *per se* relevant in the grandfather's case but not in the mother's case: while acknowledging that the grandfather had testified at the 1988 trial, it mistakenly believed

that the mother had *not* testified in 1988. Thus, when comparing Mr. Guzek's case to the facts of *Green v. Georgia*, 442 U.S. 95 (1979), the majority states:

> As in *Green*, defendant here already had been convicted of the murders of the victims, and, notwithstanding those earlier convictions, defendant sought to introduce evidence at his third penalty-phase proceeding – *which he did not seek to introduce during the guilt phase* – that, if believed, would have shown that he had not been present at the victims' home at the time of the murders.

Guzek III, 336 Or. at 462, 86 P.3d at 1127, App. to Pet. for Cert. at 60-61 (emphasis added).

The emphasized language plainly reveals the Oregon Supreme Court majority's mistake concerning the mother's testimony at the 1988 guilt-innocence trial. Any possible doubts are dispelled when the dissenting opinion is examined. Justice Gillette noted that "[t]he focus of the majority's analysis is on the testimony of defendant's mother, *which had not been offered previously* and which, like that of the grandfather, would (if believed) be wholly exculpatory." *Id.* 336 Or. at 468, 86 P.3d at 1131, App. to Pet. for Cert. at 70 (emphasis added).

The Oregon Supreme Court's mistaken belief – contrary to the record (J.A. 60-79) – that Mr. Guzek's mother had not previously testified as to alibi in the original 1988 trial is of critical importance to this Court's jurisdiction. The Oregon Supreme Court ruled *as a matter of state law* that Mr. Guzek's grandfather's 'alibi evidence' must be admitted at the impending re-sentencing trial pursuant to Or. Rev. Stat. § 138.012 because his testimony was previously admitted in the original 1988 trial and is therefore

per se relevant. Because of its erroneous assumption that Mr. Guzek's mother had not testified in the original trial, the Oregon Supreme Court, in addressing the admissibility of her proffered 'alibi' testimony, unwittingly deviated from its policy of deciding cases under state and sub-constitutional law when possible,[7] and, solely because of that mistake, proceeded to address a federal constitutional issue.[8]

Notwithstanding the Oregon Supreme Court's mistake, its holding with regard to the grandfather's testimony obliges the trial court on re-sentencing to admit the

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[7] *See, e.g., State v. Kennedy*, 295 Or. 260, 666 P.2d 1316 (1983) (Oregon Supreme Court first examines Oregon constitutional claims, only reaching federal constitutional claims when state constitutional level of inquiry is inadequate for rendering decision); *State v. Caraher*, 293 Or. 741, 653 P.2d 942 (1982) (Oregon Supreme Court will not resolve claims under state or federal Constitution, even if raised thereunder, when such claims may be resolved solely by resort to state statute). *See also* Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. Balt. L. Rev. 379, 383 (1980) (explaining Oregon Supreme Court's methodology). Linde authored this article while a Justice of the Oregon Supreme Court.

[8] Because Mr. Guzek had obtained all the relief he sought below as a matter of state law, he had no basis for seeking rehearing of that portion of the Oregon Supreme Court's decision. In the briefing below, the state, like Mr. Guzek, identified no factual or legal distinctions between the grandfather's and the mother's testimony, and argued that both should be treated the same under state law. *See Guzek III*, 336 Or. at 468, n. 31, 86 P.3d at 1131, n. 31, App. to Pet. for Cert. at 69 (Gillette, J., dissenting) (noting that "[f]or some reason, the state did not, in its extensive briefing in this case, separately discuss either the grandfather's or the mother's testimony" – that reason, of course, being the one the court below misapprehended, that there was no difference in either the procedural posture or content of the two witnesses' 'alibi testimony'). Nonetheless, when the Oregon Supreme Court treated the two witnesses differently in its opinion, the state – the losing party – did not seek that court's rehearing on the point or otherwise seek clarification. Instead, it sought this Court's writ of certiorari.

mother's testimony as a matter of state law because her testimony, like the grandfather's, was admitted at the 1988 trial. The Oregon Supreme Court's directive could not be clearer: "The transcript of defendant's grandfather's testimony – like the transcript of *any other witness's testimony* – was *relevant and subject to consideration in the penalty phase, regardless of its substance*, because it was 'previously offered and received' during the trial on the issue of guilt." *Guzek III*, 336 Or. at 451, 86 P.3d at 1121, App. to Pet. for Cert. at 43 (emphasis added).[9]

An accurate assessment of the trial court record admits of no live case or controversy between the parties concerning a federal question. The evidence involved is clearly admissible at the re-sentencing trial pursuant to a controlling and nondiscretionary Oregon statute, Or. Rev. Stat. § 138.012, as authoritatively interpreted by the highest Oregon court in the decision below. That statute constitutes a ground independent of any federal-law rationale this Court might rely upon in any judgment rendered under the writ *sub judice*.

Regardless of any judgment this Court renders in the case, Mr. Guzek will undergo a new sentencing trial at which his mother's 'alibi testimony' will be admitted as a matter of state law as authoritatively interpreted by the Oregon Supreme Court in this very case. In such a posture, no opinion issued by this Court could be other than advisory in nature and thus outside the jurisdiction of the

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[9] The second statute cited by the Oregon Supreme Court – Or. Rev. Stat. § 163.150(1)(a) (Pet. App. 1-2) – expressly mandates that capital sentencing jurors be instructed that they are to consider, in determining the appropriate penalty, all evidence admitted in both the guilt-innocence and the penalty phases. That statute has no exceptions.

Court. *See, e.g., Hewitt v. Helms*, 482 U.S. 755 (1987) ("The real value of the judicial pronouncement – what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion – is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff.*") *Id.* at 761 (emphasis in original).

This Court should accordingly summarily dismiss the writ of certiorari as improvidently granted. *See Abdur'Rahman v. Bell*, 537 U.S. 88, 89 (2002) (writ of certiorari dismissed as improvidently granted because of doubts about the Court's jurisdiction); *Nike Inc. v. Kasky*, 539 U.S. 654, 658 (2003) (writ dismissed when, among other reasons, the Court deemed it appropriate to avoid "the premature adjudication of novel constitutional questions").

Alternatively, this Court should certify to the Oregon Supreme Court the questions (1) whether its decision below was premised on a misapprehension of fact, namely, that the mother did not testify at the 1988 trial; and (2) if so, whether, under a correct understanding of the testimony at the 1988 hearing, Or. Rev. Stat. § 138.012 or other state law compels the admission of the live or prior recorded 1988 testimony of Mr. Guzek's mother at his impending capital sentencing retrial?"[10] Respondent

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[10] The Oregon version of the Uniform Certification of Questions of Law Act, codified as Or. Rev. Stat. § 28.200 *et seq.* provides, in relevant part:

> The [Oregon] Supreme Court may answer questions of law certified to it by the Supreme Court of the United States . . . when requested by the certifying court if there are involved in any proceedings before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of

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anticipates that once the Oregon Supreme Court corrects its misapprehension of the trial court record, it will hold that the mother's testimony is *per se* relevant and admissible pursuant to Or. Rev. Stat. § 138.012 as is the grandfather's prior recorded testimony. Respondent further anticipates that the Oregon Supreme Court will then disavow or vacate that portion of its opinion below predicated upon the Eighth Amendment, pursuant to the Oregon Supreme Court decisions cited in footnote 7 *ante*. Regardless of whether the Oregon high court takes the latter step, its certified answer that the mother's testimony is admissible as a matter of state law would render its prior Eighth Amendment analysis *obiter dicta*, mooting the issue upon which the writ was granted and therefore compelling its dismissal for want of jurisdiction.

As a third alternative, the case should be summarily remanded to the Oregon Supreme Court for clarification of its *ratio decidendi* based upon an accurate assessment of the trial court record. *See Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000) (case remanded to Florida Supreme Court for clarification when this Court could not discern whether state court judgment was predicated solely upon state law); *Michigan v. Long*, 463 U.S. 1032 (1983) (addressing the circumstances under which this Court will remand a case to a state court for

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the [Oregon] Supreme Court and the intermediate appellate courts of this state.

* * * A certification order shall set forth:

(1) The questions of law to be answered; and

(2) statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose.

clarification of the state court judgment, in order to determine whether this Court has jurisdiction). In *Long*, this Court stated that "[t]here may be certain circumstances in which clarification is necessary or desirable, and we will not be foreclosed from taking the appropriate action." *Id.* 463 U.S. at 1041, n. 6. *See also California v. Krivda*, 409 U.S. 33 (1972) (*per curiam*);[11] *Enterprise Irrigation Dist. v. Farmer's Mutual Canal Co.*, 243 U.S. 157, 163-65 (1917) ("Our jurisdiction is disputed and must be considered, as, indeed, it should be, even if not challenged.").[12]

Ordering one of the foregoing three alternatives is appropriate because, notwithstanding the Oregon Supreme Court's misapprehension of the trial court record and consequent discussion of a federal-law issue, the Oregon high court's decision and the Oregon statutory law it cites in regard to the grandfather's testimony conclusively require the trial court as a matter of adequate and independent state statutory law to admit the mother's

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[11] "After briefing and argument . . . , we are unable to determine whether the California Supreme Court based its holding upon the Fourth and Fourteenth Amendments to the Constitution of the United States, or upon the equivalent provision of the California Constitution, or both . . . We therefore vacate the judgment of the Supreme Court of California and remand the cause to that court for such further proceedings as may be appropriate."

409 U.S. at 34-35.

[12] "[W]e are concerned with a judgment placed upon two grounds, one involving a federal question and the other not. In such situations our jurisdiction is tested by inquiring whether the non-federal ground is independent of the other and broad enough to sustain the judgment. Where this is the case, the judgment does not depend upon the decision of any federal question and we have no power to disturb it."

243 U.S. at 163-65 (citing authority).

testimony at the re-sentencing trial. Because nothing this Court says on a federal-law issue can alter that outcome, there is no case or controversy concerning a federal question, and the Court has no constitutional basis for exercising jurisdiction.[13]

II

Contrary not only to state law but also to the Sixth and Eighth Amendments and the Fourteenth Amendment Due Process Clause, exclusion of the mother's testimony precluded Mr. Guzek from introducing evidence material to the jury's determination of the special verdict questions, including his culpable mental state, circumstances of the offense, and other reasons militating against a death sentence.

Whether offered as impeachment or as substantive evidence, the proffered 'alibi testimony' is made *per se*

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[13] "[A] review of the sources of the Court's jurisdiction is a threshold inquiry appropriate to the disposition of every case that comes before" it. *Brown Shoe Co. Inc. v. United States*, 370 U.S. 294, 305-06 (1968) (question as to Court's jurisdiction first raised from the bench during oral argument); *accord Sibron v. New York*, 392 U.S. 40, 50 n. 8 (1968) (question as to Court's jurisdiction first arose during oral argument). *See also*, R. Stern, E. Gressman, S. Shapiro, K. Geller, *Supreme Court Practice*, at 202 (8th ed. 2002) (Where it is inaccurately asserted that a "state ground is not independent or adequate" and the Court is "misled into assuming there is no jurisdictional problem in reaching the federal question, and accordingly grants review," the Court may subsequently "make its own thorough examination of the record and uncover a jurisdictional fault. If so . . . the Court will . . . dismiss the case for want of jurisdiction or as improvidently granted.").

relevant and admissible on re-sentencing by Oregon statute because that testimony was previously offered at Mr. Guzek's original 1988 trial. *See* Or. Rev. Stat. §§ 138.012, 163.150. That testimony also (1) is material to the three (sometimes four)[14] statutory questions submitted to the jury which determine whether a death sentence may be imposed and (2) is an essential component of Mr. Guzek's ability to rebut and impeach the state's aggravation case against him. For all these reasons, exclusion of that evidence not only violated state law, *see* Point I above, but also violated the Eighth and Fourteenth Amendments to the United States Constitution.

This Court has stated that in capital cases, the Eighth Amendment provides both substantive and procedural protections.[15] Likewise, the Fourteenth Amendment Due Process Clause guarantees fair trial procedures, including a fair capital sentencing hearing.[16] Decisions of this Court construing federal constitutional procedural requirements for capital sentencing proceedings have sometimes been grounded in the Eighth Amendment, at other times in the Fourteenth Amendment's Due Process Clause, and often in both. In *Gardner v. Florida*, 430 U.S. 349 (1977), for example, eight Justices agreed that a Florida procedure

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[14] The third statutory special verdict sentencing question – whether the homicide was an unreasonable response to victim provocation – was not "raised by the evidence," and accordingly was not submitted to the jury, by stipulation. *See* Or. Rev. Stat. § 163.150(1)(b)(C) set forth at Pet. App. 3.

[15] *See Ford v. Wainwright*, 477 U.S. 399, 405 (1986) ("[T]he Eighth Amendment has been recognized to affect significantly both the procedural and the substantive aspects of the death penalty . . . ").

[16] *In re Winship*, 397 U.S. 358 (1970); *Pointer v. Texas*, 380 U.S. 400 (1965).

governing the admissibility of evidence at the capital-sentencing phase violated the Constitution, with some Justices resting their decision on the Eighth and Fourteenth Amendments and other Justices resting it on the Fourteenth Amendment Due Process Clause alone. *See id.* at 362 (plurality opinion on Eighth Amendment grounds); *id.* at 363-64 (White, J., concurring on due process grounds). *Compare, e.g., Green v. Georgia*, *supra* (the trial court's refusal to permit a capital defendant at the sentencing phase to introduce the testimony of a witness to whom the codefendant confided that he sent the defendant on an errand before personally killing the victim violated the Fourteenth Amendment Due Process Clause) *with, e.g., Penry v. Lynaugh*, *supra*, 492 U.S. at 302 (vacating a death sentence imposed under a statute nearly identical to Oregon's because the "State could not, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence" revealing the defendant's relatively low level of culpability).

Similarly, in *Simmons v. South Carolina*, 512 U.S. 154 (1994), seven of this Court's Justices agreed that it was procedurally unconstitutional for the state trial court to fail to instruct the capital sentencing jury of the fact that under the state's law, a life sentence carried no possibility of parole, where the life sentence was the jury's only alternative to a death sentence, and the state's evidence placed the capital defendant's future dangerousness in issue. As in *Gardner*, disagreements among the concurring opinions as to whether the unconstitutionality arose from violation of the Eighth, or the Fourteenth, Amendment, or both, produced a four-Justice plurality opinion stating the Fourteenth Amendment Due Process Clause to be the

source of the right violated, but acknowledging the interplay between Eighth and Fourteenth Amendment procedural fairness requirements in capital cases:

> In *Skipper v. South Carolina*, 476 U.S. 1 (1986), this Court held that a defendant was denied due process by the refusal of the state trial court to admit evidence of the defendant's good behavior in prison in the penalty phase of his capital trial. Although the majority opinion stressed that the defendant's good behavior in prison was "relevant evidence in mitigation of punishment," and thus admissible under the Eighth Amendment, *id.*, at 4, citing *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion), the *Skipper* opinion expressly noted that the Court's conclusion also was compelled by the Due Process Clause. The Court explained that where the prosecution relies on a prediction of future dangerousness in requesting the death penalty, elemental due process principles operate to require admission of the defendant's relevant evidence in rebuttal. 476 U.S., at 5, n. 1. *See also id.*, at 9 (Powell, J., opinion concurring in judgment) ("Because petitioner was not allowed to rebut evidence and argument used against him," the defendant clearly was denied due process).

Simmons, 512 U.S. at 154.

In *Penry v. Lynaugh*, *supra*, this Court noted, in vacating a death sentence under a statute nearly identical to Oregon's:

> [I]t was clear from *Lockett* and *Eddings*, that a State could not, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence

> relevant to the defendant's background or character or the circumstances of the offense that mitigate against imposing the death penalty.

Id. 492 U.S. at 302.

In *Kelly v. South Carolina*, 534 U.S. 246 a majority of this Court held that Fourteenth Amendment due process was violated when the trial judge excluded a capital defendant's evidence that he would never be paroled if the jury opted for a life sentence.

Given the overlapping requirements of fair capital procedures under the Eighth and Fourteenth Amendments and under the Fourteenth Amendment Due Process Clause alone, and this Court's prior holding in *Skipper* that denial of a defendant's right to present evidence militating against a death sentence may violate both constitutional provisions, Mr. Guzek invokes both provisions here, as he did below. Below, Mr. Guzek also grounded his claims in the Confrontation Clause of the Sixth Amendment, which he likewise invokes here.[17] (Mr. Guzek reiterates, however, that his claims are fully grounded in the first instance under *state* statutory law.)

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[17] *See, Pointer v. Texas*, 380 U.S. 400, 406 (1965) (Sixth Amendment Confrontation Clause applies to states); *see also, Crawford v. Washington*, 541 U.S. 36, 50-51, 57, 68 (2004) (in absence of *adequate* opportunity for prior cross-examination, admission of prior recorded testimony of accuser without confrontation in subsequent proceeding, violates Confrontation Clause).

A. Excluding the mother's 'alibi evidence' unconstitutionally prevented Mr. Guzek from demonstrating to the jurors that the evidence of his guilt was not morally sufficient to justify his execution – as it must be under Oregon law to permit a death sentence.

The Oregon Supreme Court was correct in holding that the Eighth Amendment gave Mr. Guzek the right to respond to any evidence the prosecution offered in support of a death sentence that related (*inter alia*) to the "circumstances of the offense." As this Court has held, "[t]he sentencer must be able to consider and give effect" to any evidence that enables it to reach "'*a reasoned moral response* to the defendant's background, character, *and crime*.'" *Penry*, *supra*, 492 U.S. at 319 (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (emphasis added)). *See Penry v. Lynaugh*, *supra*; *Eddings v. Oklahoma*, 455 U.S. 104 (1982), *Lockett v. Ohio*, 438 U.S. 586 (1978).

As is noted above, Oregon statutory law as authoritatively interpreted by the Oregon Supreme Court makes relevant and admissible at the penalty phase *all* evidence admitted at the guilt-innocence phase. Or. Rev. Stat. §§ 138.012, 163.150 (discussed p. 11, *ante*). These provisions require and enable the re-sentencing jury to revisit all the evidence of the crime and to make a judgment that the death penalty not only is *factually* warranted by the evidence of the crime (the issue litigated at the guilt-innocence phase), but also and in addition that execution is *morally* warranted by the evidence of the crime in its entirety (the issue at the penalty phase).

Oregon law is clear that the judgment the jury is to make at the capital sentencing phase – about the crime as

well as the defendant – is a *moral* one that transcends the factual questions that govern the decision at the guilt-innocence phase. In *State v. Wagner*, 309 Or. 5, 786 P.2d 93 (1990), the Oregon Supreme Court authoritatively interpreted the statutory "fourth question" for the jury at the penalty phase of a capital trial: "Whether the defendant should receive a death sentence." Or. Rev. Stat. § 163.150(1)(b)(D). The Oregon high court held that this factor is not "subject to proof in the traditional sense," because "it frames a discretionary determination for the jury." *Id.* 309 Or. at 25, 786 P.2d at 100. In construing the fourth question, "we are asking the jury, in making its finding, to consider any mitigating aspect of defendant's life, alone or in combination, *not necessarily related causally to the offense.*" *Id.* 309 Or. at 20, 786 P.2d at 101 (emphasis added).

Under Oregon law, the range of "mitigating circumstances" is far reaching.

> In answering all of these questions, you are to consider *any circumstances* you find to be mitigating in the defendant's background or character or the circumstances of the offense. Mitigating circumstances include *but are not limited to* such matters as the defendant's age, the extent and severity of the defendant's prior criminal conduct, and the extent of the mental and emotional pressure under which the defendant was acting at the time the murder was committed. *Any circumstance is mitigating if it leads any one of you to conclude that the defendant ought to receive a sentence less than death or that the answer to these questions should be "no." There is no burden of proof for mitigating circumstances. If any one of you believes a mitigating circumstance exists, you*

> *may consider it in answering all of the questions in this case.*

Or. Uniform Crim. Jur. Instr. No. 1319 (emphasis added). Under the Oregon Supreme Court's interpretation of Or. Rev. Stat. § 163.150(1)(b)(D), jurors are permitted to decline to impose a death sentence for *any* reason having to do with its assessment of the crime or the defendant. *State v. Compton*, 333 Or. 274, 283-84, 39 P.3d 833, 839 (2002). *See also State v. Pinnell*, 311 Or. 98, 117, 806 P.2d 110, 122 (1991) (the fourth question permits the jury to spare a defendant's life if the jury believes, under all the circumstances, that it is appropriate to do so); *State v. Simonsen*, 310 Or. 412, 414, 798 P.2d 241, 242 (1990) (the fourth question permits a jury to spare a defendant from the death penalty); *State v. Stevens*, 319 Or. 573, 584, 879 P.2d 162, 167-68 (1994) (under the "fourth question," juries may consider, "as a mitigating factor, any aspect of a defendant's character * * * that the defendant proffers as a basis for a sentence less than death.") *accord*, *Guzek II*, 322 Or. at 256, 906 P.2d at 279.

The substantive standard on which a death penalty is or is not warranted is a matter of state law. *See, e.g.*, *Blystone v. Pennsylvania*, 494 U.S. 299, 309 (1990). But once the state's standard identifies facts and circumstances about the crime and the defendant that morally mitigate against a death sentence, the state may not, consistently with the Eighth and Fourteenth Amendments, bar a defendant from adducing evidence in support of that basis for mitigation. *See, e.g.*, *Skipper v. South Carolina*, 476 U.S. at 5, n. 1 (where state law treats predictions about a defendant's future behavior as a factor relevant to sentencing, it violates the Eighth Amendment

to prevent him from adducing mitigating evidence revealing that he is capable of adjusting well in prison).

At the 1997 re-sentencing hearing, the state took advantage of its statutory right to reintroduce its guilt-innocence phase evidence in an effort to convince the sentencing jury that a sentence of death was morally warranted by the evidence of the crime. In particular, the state put the entire guilt phase testimony of Mr. Guzek's codefendants before the jury in support of the claim that the evidence of Mr. Guzek's actions on the night of the killings made him (1) morally culpable enough to deserve a death sentence and (2) *more* morally culpable than the codefendants, who received life sentences. Under the Oregon statutory law discussed at p. 24, *ante*, the contrary testimony of Mr. Guzek's own witnesses about his actions on the night of the killings was equally "relevant and subject to consideration in the penalty phase" as a basis for the jury's assessment whether the evidence of the crime, taken as a whole, provided not only a factually sufficient basis for convicting him (the sole focus of the guilt-innocence phase) but additionally, whether the evidence provided a *morally* sufficient basis for executing him that is required at the penalty phase. *Guzek III*, 336 Or. at 451, 86 P.3d at 1121, App. to Pet. for Cert. at 43-44. To forbid Mr. Guzek to present this evidence that state law makes "relevant and subject to consideration at the penalty phase" accordingly violates not only state law, but also the Eighth Amendment principle that capital defendants are entitled to the full moral weight of their evidence in favor of a sentence less than death. *See, e.g.*, *Penry v. Lynaugh*, *supra*, 492 U.S. at 323; *Hitchcock v. Dugger*, 481 U.S. 393, 399 (1987); *Eddings v. Oklahoma*,

supra, 455 U.S. at 114; *Lockett v. Ohio*, *supra*, 438 U.S. at 604.

B. Excluding the mother's testimony unconstitutionally prevented Mr. Guzek from demonstrating to the jurors that he did not "deliberately" kill the victims – a culpable mental state required by Oregon law to permit a death sentence – and that his culpability as a whole did not justify a death sentence.

Mr. Guzek had a statutory and constitutional right to put on his guilt-innocence phase 'alibi testimony' even if the state at the 1997 re-sentencing trial had not sought to reintroduce the testimony of his codefendants from the 1988 trial. But once the state did introduce the codefendants' testimony, Mr. Guzek had a particularly clear and compelling right, as a matter of state and federal law, to use his 'alibi testimony' to rebut the state's case. As the Oregon Supreme Court stated below:

> [t]he state did not offer the transcripts only because they were transcripts from the guilt-phase proceeding. Instead, the state relied on [codefendant] Wilson's and Cathey's transcript testimony, in lieu of their live testimony, also to prove two elements of the state's case in the *penalty-phase proceeding*, namely, that defendant had acted deliberately within the meaning of ORS 163.150(1)(b)(A) and that a probability existed that defendant would commit violent criminal acts in the future, thus posing a continuing threat to society within the meaning of ORS 163.150(1)(b)(B). In other words, even though Wilson's and Cathey's transcript testimony introduced during the penalty-phase proceeding consisted of their testimony from the guilt phase,

> the state put that testimony to an additional use in the penalty phase, specifically, to prove that defendant should receive a sentence of death. That is significant, because it demonstrates that the state made the credibility of Wilson and Cathey relevant to the *penalty-phase proceeding* and opened the door for defendant's impeachment of their testimony. *See State v. Johanesen*, 319 Or. 128, 135-37, 873 P.2d 1065 (1994) (discussing relevance of extrinsic evidence for impeaching credibility of witness).

Guzek III, 336 Or. at 449, 86 P.3d at 1120, App. to Pet. for Cert. at 40-41 (emphasis added).

As the Oregon Supreme Court held, Mr. Guzek's rejected evidence tended *inter alia* to rebut and impeach the state's evidence that he "deliberately" caused the deaths of the victims. "Deliberation" is one of the three (or in some cases four) statutory sentencing elements that is crucial to the jury's determination at the capital-sentencing phase in Oregon. *See* Or. Rev. Stat. § 163.150(1)(b), setting forth statutory special verdict issues, reproduced in full in Pet. App. at 1-6.

Oregon's statute under which Mr. Guzek was indicted and convicted provides that a person is guilty of aggravated murder if the perpetrator "intentionally causes the death of another human being." Or. Rev. Stat. § 163.095. In deciding whether to impose a death sentence after convicting a defendant of aggravated murder, the jury must additionally determine, *inter alia*, whether the defendant "deliberately" caused the death of the victim. Or. Rev. Stat. § 163.150(1)(b)(A). The mental state of "deliberate" is, under Oregon law, a more culpable one than "intentional." A person acts "intentionally" under

Oregon law if the person " . . . acts with a conscious objective to cause the result . . . " Or. Rev. Stat. § 161.105(7). "The word *deliberately* has a different meaning from *intentionally*. Deliberately means that state of mind that examines and considers whether a contemplated act should or should not be done. Deliberation is present if the thinking is being done in such a cool mental state, under such circumstances, and for such a period of time as to permit a careful weighing of the proposed decision." Oregon Uniform Criminal Jury Instruction No. 1319; *see State v. Quinn*, 290 Or. 383, 401, 623 P.2d 630, 640 (1981).

Because the original 1988 convicting trial jury had already found that Mr. Guzek acted "intentionally," the question whether he acted under the aggravating, more culpable "deliberate" mental state was the sole mental state question the 1997 re-sentencing jury had to resolve in deciding whether to impose a death sentence. On that crucial question, the only evidence presented by the state was the testimony of Mr. Guzek's codefendant-accusers that he conceived, plotted and choreographed the double homicide.

One way for Mr. Guzek to rebut the codefendants' testimony, of course, would be to show that he was elsewhere than the codefendants claimed when the crucial planning activities occurred or, at least, that there is a reasonable doubt on the issue. Sowing reasonable doubt as to deliberation in the mind of a single juror in this way would render Mr. Guzek ineligible for the death penalty regardless of whether he was present at the time of one or both homicides and regardless of whether he committed one or both of them intentionally. In other words, proof that Mr. Guzek was elsewhere at the time of the activities commensurate with deliberation would render

him ineligible to be executed (because the killing was not deliberate), notwithstanding the jury's belief that he was guilty of murder (because the killing was intentional).

Another way for Mr. Guzek to accomplish the same goal was to convince the penalty-phase jury that other aspects of the codefendants' testimony were false and thus that their testimony relating to deliberation should similarly be discredited. Under Oregon law, demonstrating that the codefendant-accusers lied about *any aspect* of the circumstances of the offense would entitle the jury to discredit other aspects of the codefendants' stories. *See* Or. Rev. Stat. § 10.095(3) (where supported by the evidence, trial judge may instruct the jurors that "[a] witness false in one part of the testimony of the witness is to be distrusted in others.") One well-established and long-recognized method of proving that the codefendants lied in at least some respects and thus are not entitled to belief in regard to their testimony on the question of deliberation was by way of "impeachment by contradiction," *i.e.*, by introducing other witnesses to testify to facts that contradict material facts to which the codefendants testified. *See, e.g., Blue Ribbon Bldgs. v. Struthers*, 276 Or. 1199, 1205, 557 P.2d 1350, 1353 (1976) (impeachment of an adverse witness by production of a party's witness, who specifically contradicts testimony of the adverse witness on a material or non-collateral issue is an acceptable method of impeachment under Oregon law). If, that is, the jury believed that Mr. Guzek was elsewhere than the codefendants claimed at *any* time during which the crimes were being committed, doubts on that material issue would entitle the jurors to disregard or give little weight to the codefendants'

testimony in regard to other facts, including Mr. Guzek's alleged deliberation on the victims' deaths.[18]

If any part of Mr. Guzek's 'alibi testimony' were believed, therefore, it could have rebutted or impeached the state's evidence of deliberation in either or both of these two ways. First, crediting the testimony of Mr. Guzek's mother that he was at her home between 2:16 a.m. and 4:30 a.m., might have convinced the jury that (or at least created a reasonable doubt in the mind of one or more of the jurors as to whether) he was present at the time of events that were central to the prosecution's case in favor of deliberation.

Second, if one or more jurors concluded that Mr. Guzek was with his grandfather for several hours prior to the murders, such doubt about the codefendants' testimony on that score would entitle jurors to reject the codefendants' testimony on *all other matters*, including matters relating to Mr. Guzek's role in the murders, including deliberation. Based on the 'alibi testimony' of Mr.

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[18] State evidentiary rules denoting what evidence is admissible, including what testimony is admissible "extrinsic" evidence, are different in each state and not subject to plenary interference by this Court absent their application in a manner that violates federal law. *See, e.g., Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *Gardner, supra*, 430 U.S. at 362. As a matter of Eighth and Fourteenth Amendment jurisprudence, however, any evidence that under state law is material "to the defendant's background or character or the circumstances of the offense that mitigate against imposing the death penalty" is *constitutionally relevant* and cannot constitutionally be excluded at the penalty phase. *Penry, supra*, 492 U.S. at 327-28. *See Skipper v. South Carolina, supra*, 476 U.S. at 4-5 ("Although it is true that any such inferences would not relate specifically to petitioner's culpability for the crime he committed, . . . there is no question but that such inferences [adjustment to incarceration] would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death.'")

Guzek's grandfather and mother, one or more jurors might conclude that the codefendants lied to reduce their evident culpability and increase Mr. Guzek's. Under these circumstances, a juror again would be entitled to conclude that, although Mr. Guzek was guilty of intentional murder (the issue resolved at the guilt-innocence phase), *everything* to which the codefendants testified on the subject of Mr. Guzek's relative culpability was false and thus, there was a reasonable doubt whether Mr. Guzek deliberated at any time on the killings. In the absence of proof beyond a reasonable doubt of *deliberation* satisfying all twelve jurors, the jury again would be required to reject the death penalty, notwithstanding its belief (whether based on evidence or mandatory instruction) that Mr. Guzek had been properly convicted of *intentional* murder.[19]

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[19] Admitting the extrinsic 'alibi testimony' of Mr. Guzek's mother to impeach the codefendants' testimony is consistent with longstanding evidentiary common law. *See, e.g.*, McCormick, Handbook of the Law of Evidence, 2nd ed. § 47: *Impeachment by "Contradiction": Disproving the Facts Testified to by the First Witness*," at p. 99. Facts admissible under the rule permitting the admissibility of extrinsic evidence to impeach by contradiction include "facts showing . . . want of capacity or opportunity for knowledge." *Id.* If Mr. Guzek was not present at the scene of the homicides when circumstances of the offenses attributed to him occurred, or was absent when the homicidal plot was hatched, then the codefendants would lack "capacity or opportunity for knowledge" of those circumstances of Mr. Guzek's purported involvement. McCormick describes a third category of facts admissible to impeach through contradiction:

> Suppose a witness has told a story of a transaction critical to the controversy. To prove him wrong in some trivial detail of time, place or circumstance is 'collateral.' But to prove untrue some fact recited by the witness that if he were really there and saw what he claims to have seen, he could not have been mistaken about, is a convincing kind of impeachment that the courts must make place for, although the contradiction evidence is otherwise inadmissible because it

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Accordingly, Mr. Guzek was entitled both under the procedural aspects of the Court's Eighth Amendment capital jurisprudence and under the Fourteenth Amendment Due Process Clause (as well as under Oregon state law, *see* p. 11, *ante*) to rebut or impeach the testimony of codefendants Wilson and Cathey as to his deliberation. Under federal (as well as state) law, Mr. Guzek was entitled to accomplish those goals by offering extrinsic evidence that undermined specific details of the codefendants' tales – including the testimony of his mother that, contrary to what the codefendants said, Mr. Guzek was not present when important aspects of the criminal events occurred. His mother's testimony was accordingly critical evidence of Mr. Guzek's moral culpability for the crimes – and of his moral culpability compared to that of the codefendants – which was directly material in challenging the state's assertion that he acted deliberately and that he, alone among the three defendants, deserved the death penalty.

In this respect, the error committed by the trial court here is similar to the Due Process violation found by this Court in its decision in *Green v. Georgia*, *supra* – a case cited by the majority in the *Guzek III* opinion below. In *Green*, the capital defendant sought to introduce in the penalty phase, by recitation of an inmate witness, the

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> is collateral under the tests mentioned above. *To disprove such a fact is to pull out the linchpin of the story*. So we may recognize this . . . type of allowable contradiction, namely, the contradiction of any part of the witness' account of the *background and circumstances of a material transaction*, which as a matter of human experience he would not have been mistaken about if his story were true.

Id. (footnotes omitted; emphasis added).

extrajudicial admission of the separately adjudicated codefendant that the codefendant alone had inflicted the fatal gunshots after sending Green away on errands. This Court held that the trial court's refusal to permit that evidence violated Mr. Green's due process right to present crucial defensive evidence at the penalty phase of his capital trial. *Green, supra*, 442 U.S. at 97.

The trial court's exclusion of the testimony of Mr. Guzek's mother strongly implicates the holding in *Green*. In both cases, the capital defendant was denied the opportunity to deny or explain evidence introduced in aggravation by the prosecution that identified the defendant as the principal moving force behind the homicide and thus was highly material to the sentence ultimately imposed.

The similarity between this case and *Green* is especially clear given other evidence the Oregon Supreme Court, in rulings not challenged here, ordered the trial court to admit at the upcoming re-sentencing hearing. *Guzek III*, 336 Or. at 449-50, 86 P.3d at 1120-21. (J.A. 41-42). That evidence includes statements made by the codefendants in the years since Mr. Guzek's original trial that (1) expressly recanted their prior testimony that Mr. Guzek was the ringleader, (2) indicated that the codefendants would finally "tell the truth" about the circumstances of the offense if they were called to testify again, then (3) indicated that the codefendants instead would refuse to testify at any re-sentencing (as indeed occurred) out of fear that if they told the truth at the retrial, the prosecutor would void their life-saving plea agreements

and seek the same fate against them that the prosecutor secured against Mr. Guzek.[20] (J.A. 103-07).

This undeniably admissible evidence that the codefendants lied at Mr. Guzek's guilt-innocence trial to save their own lives – including on the issue of Mr. Guzek's ringleader status and thus on whether he deliberated on the killings – lends new weight to the testimony of Mr. Guzek's mother that he was not present during at least some portions of the events in which the codefendants implicated him. Although jurors are instructed they may not reconsider guilt at this stage of proceedings, this new evidence does not come too late to undermine the testimony of his codefendants. The state has consistently asked the jury to premise a conclusion that Mr. Guzek deliberated on the killings and otherwise deserves to die, predicated upon the codefendants' 1988 testimony. By depriving Mr. Guzek of his evidence in its *entirety* – including his mother's testimony undermining the codefendants' claims that he was present and leading the way – the trial court violated Due Process principles this Court applied in *Green*.[21]

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[20] As is discussed in the Statement of the Case (pp. 3-6 *ante*), the state avoided the introduction of these statements at the 1997 resentencing trial by securing two rulings from the judge. First, the state was permitted to introduce the codefendants' testimony through "dramatic readings" by police cadets of the codefendants' testimony at the 1988 guilt trial. Second, the trial court forbade Mr. Guzek to introduce extrinsic evidence of the codefendants' subsequent statements. The Oregon Supreme Court reversed the latter of these two rulings on state-law grounds that are not in issue here. *Guzek III*, 336 Or. at 447-50, 86 P.3d at 1119-21, App. to Pet. for Cert. at 38-42.

[21] The post-1988 evidence that the codefendants lied at Mr. Guzek's guilt-innocence trial illustrates that the inferences he is asking the jury to draw on retrial are not "*lingering* doubt" inferences remaining after

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This Court has recognized that a party usually should be allowed "to present to the jury a full picture of the events relied upon," because evidence in combination "has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict." *Old Chief v. United States*, 519 U.S. 172, 187 (1997). All ten of Mr. Guzek's items of impeachment – consisting of his grandfather's and mother's 'alibi evidence' presented in 1988 *and* of the post-1988 inconsistent statements of the codefendants – together have "force beyond any linear scheme of reasoning" and beyond what any subset of that evidence by itself could attain. Mr. Guzek accordingly was entitled in his 1997 penalty retrial to each juror's assessment of the moral weight of *all* of his rebutting and impeaching

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the jury convicted him in the first trial phase. On the contrary, he is asking the jury (*inter alia*) to rely on *newly* sown doubts about what happened arising from statements by the codefendants made *after* the 1988 trial. Those statements have been held admissible at the upcoming re-sentencing trial as a matter of state law, and together with the 'alibi testimony' at issue here place the entirety of the state's evidence at the penalty phase in a new light – one that a jury might well conclude is inconsistent with believing the codefendants and with imposing the death penalty. Because both the new, post-1988 evidence and the prior 'alibi testimony' adduced in the original guilt phase are admissible under state statutes (*see* p. 11, *ante*), Oregon's objection to the admissibility of this evidence in essence seeks to nullify *state* legislative policy. That policy permits Mr. Guzek to rely on the entirety of his evidence, old and new, that the codefendants are not worthy of belief and that he does not deserve to die. Oregon's qualms about this legislative judgment are properly directed to its own statehouse, not to this Court.

evidence in order for each juror to have a full picture of the crime and of the codefendants' veracity.[22]

As this Court has stated:

> Capital sentencing proceedings must of course satisfy the dictates of the Due Process Clause, *Clemons* v. *Mississippi*, 494 U.S. 738, 746 (1990), and one of the hallmarks of due process in our adversary system is the defendant's ability to meet the State's case against him. *Cf. Crane* v. *Kentucky*, 476 U.S. 683, 690 (1986).

Simmons v. South Carolina, 512 U.S. at 175 (quoting *California v. Ramos*, 463 U.S. 992, 1002-03 (1983)). Although Oregon and its *amici* argue that Mr. Guzek should not be permitted to "relitigate his guilt," what Mr. Guzek in fact was prevented from doing at his 1997 re-sentencing trial was to impeach and rebut evidence offered by the prosecution as justification for the jury's imposition of the death penalty.

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[22] Petitioner overlooks another salient fact: Mr. Guzek was convicted of the aggravated murder of two victims even though the state's proof at trial was that he caused only one death "personally." The state's theory of liability with respect to the other killing was that Mr. Guzek acted in concert with codefendant Wilson, who "personally" killed the other victim. Wilson testified in 1988 that he killed one victim upon Mr. Guzek saying "Do it." The excluded defense evidence – including the testimony of Mr. Guzek's mother as to his whereabouts during specific time periods on the night of the homicides – would have impeached the state's star witnesses and potentially caused one or more of the jurors to reasonably doubt whether Mr. Guzek personally committed or commanded either slaying. It further would have rebutted the state's aggravating evidence depicting Mr. Guzek as a cold-blooded homicidal plotter who choreographed the crimes. Whether admitted as impeachment or as substantive evidence, the testimony at issue would have both undermined the credibility of the codefendant accusers and militated against the jury findings requisite to a death sentence.

Although Respondent here has focused on the first of the statutory special verdict questions, the same reasoning applies with equal force to Mr. Guzek's right to impeach the codefendants by means of direct contradiction and to rebut the state's aggravation case in favor of death, regarding the other two special verdict questions before the sentencing jury.

C. Excluding the mother's 'alibi evidence' violated other due process principles when the trial court allowed admission of prior testimony as aggravating evidence under Or. Rev. Stat. § 138.012 while simultaneously construing the statute in a *non*-reciprocal manner to deny admission of Mr. Guzek's impeaching, rebutting and mitigating evidence.

At the 1997 retrial proceeding, the trial court permitted the State to invoke Or. Rev. Stat. § 138.012(2)(b) as a basis for presenting at the capital re-sentencing phase, testimony previously admitted at the guilt-innocence phase. Yet, the trial court denied Mr. Guzek the benefit of the same statute to rebut the state's testimony. Together, these rulings violate the due process principle that this Court enforced in *Wardius v. Oregon*, 412 U.S. 470 (1973):

> This Court has . . . been particularly suspicious of state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial. *See, e.g., Washington v. Texas*, 388 U.S. 14, 22 (1967); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). *Cf.* Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L.J. 1149, 1180-1192 (1960)."

Id. at 474, n. 6.

This Court has long disapproved of unjustifiable limitations on a defendant's ability to respond in kind to the prosecution's claims. For example, in *Chambers v. Mississippi*, *supra*, this Court reversed a murder conviction where the defendant's evidence that another person had confessed to the crime was excluded by the trial court on the basis of a state evidentiary rule that prohibited a party from impeaching its own witnesses. This Court held that fundamental fairness under the Due Process Clause required that under such circumstances, such technical application of state court evidentiary rules be forbidden where such application interfered with the ability of a defendant to respond to the state's case. *Id.* 410 U.S. at 302.

Petitioner Oregon seeks a death sentence for Mr. Guzek under a procedure in which the prosecution would introduce – before a jury that did not hear the original guilt-innocence case – only such evidence and testimony admitted therein which painted Mr. Guzek as a ringleader and the most culpable of three men convicted of double aggravated murder, while excluding other testimony casting doubt on such claims. Such a non-reciprocal and fundamentally unfair formula strikes at the very heart of the Due Process Clause. *See Gardner v. Florida*, *supra*, 430 U.S. at 362 ("We conclude that petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain.").

True, the state may not be required to adopt rules allowing the broad admissibility of guilt-phase evidence at subsequent re-sentencing proceedings. But once the state does adopt such rules, it is obliged to apply them even-handedly and consistently with the Due Process Clause.

See Vitek v. Jones, 445 U.S. 480, 488-89 (1980) (even where Fourteenth Amendment Due Process Clause otherwise would not require a particular state procedure, the *state's* creation of that procedural right created liberty and property interests that the Due Process Clause forbade the state to exercise or withdraw in an arbitrary manner).

Accordingly, the trial court's refusal to apply Or. Rev. Stat. § 138.012 even-handedly to allow Mr. Guzek to present his mother's prior guilt-phase testimony in order to respond to the guilt-phase evidence the state was permitted to introduce was fundamentally unfair, resulting in the statute's application for the state's benefit only. As a result, Mr. Guzek was not permitted to meet the aggravation case against him, denying him the process which he was due under Oregon's capital sentencing procedures, in violation of the Fourteenth Amendment.

D. The State's "residual doubt" characterization of the uses the Oregon Supreme Court permitted Mr. Guzek to make of his mother's testimony on retrial is manifestly wrong, as is its characterization of that testimony as "irrelevant."

Oregon's characterization of the proffered 'alibi evidence' as "residual" or "lingering doubt" evidence is based on the unfounded speculation that jurors will put the evidence to improper use in violation of appropriate limiting instruction *to consider the evidence solely insofar as it rebuts and undermines the credibility of the codefendants' penalty-phase testimony.* "The assumption that jurors are able to follow the court's instructions fully applies when rights guaranteed by the [Constitution] are at issue. *See, e.g., Frazier v. Cupp*, 394 U.S. 731, 735

(1969)." *Tennessee v. Street*, 471 U.S. 409, 415, n. 6 (1985). Here, Oregon effectively asks this Court to assume ahead of time that Oregon jurors will decline to follow appropriate limiting instructions, without any proof or indication that such "nullification" would occur at a retrial conducted under the watchful eye of the trial judge in this case. A more concrete example of a request for an advisory opinion is difficult to postulate.

In addition, the "residual doubt" uses of evidence that the state argues are not constitutionally required are *different* from the uses the Oregon Supreme Court has allowed Mr. Guzek to make of his mother's 'alibi testimony.' As is explained in detail above, the Oregon Supreme Court permitted Mr. Guzek to introduce that evidence *not* because of its "tend[ency] to negate his guilt" but because of its capacity to rebut and impeach the state's own case at the *capital-sentencing* phase. That two of Mr. Guzek's ten offers of proof rejected by the trial court consisted of testimony that – *if offered at the guilt phase* – would have tended to "negate guilt," is immaterial to their admissibility for purposes of rebutting and impeaching evidence the state itself presented at the penalty phase. It was exactly on this ground that the Oregon Supreme Court majority concluded that the 'alibi testimony' was *not* 'residual doubt' evidence and distinguished it from the type of "residual doubt" evidence this Court addressed in *Franklin v. Lynaugh*, *supra*.[23] *Guzek III*, 336 Or. at 463, n. 30, 86 P.3d 1128, n. 30, App. to Pet. for Cert. at 62-63.

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[23] Oregon thus in effect has procured a writ of certiorari to review a question addressed by the dissenting opinion below but *not* the majority opinion. As the majority recognized, the testimony of Mr. Guzek's mother was not offered as substantive 'residual doubt" evidence, but

(Continued on following page)

The central argument of both Petitioner Oregon and its supporting *amici* is that the 'alibi testimony' Mr. Guzek's mother provided at the 1988 guilt-innocence trial and that he is seeking to present again at the re-sentencing trial is "irrelevant" as a matter of state law. Brief of Pet. at 14, Brief of U.S. Solicitor General at 16, Brief of States at 15-16. This argument is flatly wrong. In a portion of the Oregon Supreme Court judgment below that the state does not and cannot challenge here, the Oregon high court ruled as a matter of Oregon law that the testimony "of *any* witness[ ]" is "*relevant* and subject to consideration in the penalty phase, regardless of its substance" as long as "it was 'previously offered and received' during the trial on the issue of guilt. Or. Rev. Stat. § 163.150(1)(a); *see also* Or. Rev. Stat. § 138.012(2)(b)." *Guzek III*, 336 Or. at 451, 86 P.3d at 1121, App. to Pet. for Cert. at 43-44. Because there is no doubt that the 'alibi testimony' of Mr. Guzek's mother "was 'previously offered and received' during [his] trial on the issue of guilt" in 1988,[24] there likewise is no doubt under state law that the mother's testimony is "relevant and subject to consideration in the penalty phase."

The same conclusion is mandated by the plain terms of the statutes the Oregon Supreme Court cited, Or. Rev.

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rather to impeach the unavailable codefendants' prior recorded testimony and to rebut the prosecution's claims that Mr. Guzek was more culpable than those codefendant accusers, who were spared jeopardy of death in exchange for that 1988 testimony, but who then refused to testify in the subsequent sentencing re-trials. Only the dissent below – not the majority – erroneously labeled the excluded testimony as " 'residual' or 'lingering' doubt" evidence.

[24] The mother's trial testimony is in the Joint Appendix by the parties' stipulation (J.A. 60-79). The state has never suggested that the testimony was not properly received at the guilt trial. *See* footnotes 6, 8 *ante*.

Stat. §§ 138.012, 163.150. Thus, § 138.012(2)(b) expressly permits the introduction by either party of evidence and transcripts from the original trial in any penalty phase retrial and further provides that "*[e]ither party* may recall *any witness* who testified at the prior trial or sentencing proceeding and may present additional relevant evidence" (emphasis added). Further, § 163.150 provides "that *all* evidence previously offered and received [during the guilt-innocence phase] may be considered for purposes of the sentencing hearing" (emphasis added). Faced with this plain language, it is impossible to make sense of the state's claim that the proffered 'alibi evidence' was "irrelevant" under state law. Pet. Br. at 14.[25]

Nor does Oregon point to any provision of state law that makes evidence irrelevant and inadmissible when offered for the other set of purposes for which the Oregon Supreme Court ruled the mother's 'alibi testimony' admissible. The State points to nothing in Oregon law that prevents a capital defendant from presenting testimony designed to rebut evidence the prosecution itself presents "in the penalty phase . . . to prove that defendant should receive a sentence of death" or to facilitate the "defendant's impeachment of [the] testimony" of the state's penalty-phase witnesses. *Guzek III*, 336 Or. at 449, 86 P.3d

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[25] Petitioner Oregon appears to contend that where a death sentence is vacated due to denial of the capital defendant's rights to present relevant sentencing evidence, the defendant on penalty retrial is permitted fewer rights to introduce evidence relevant to sentencing than existed in the procedurally defective prior proceeding. A statutory scheme which operated to penalize a defendant who prevailed on direct review, by mandating exacerbation of the reversible error on remand, would be odd, indeed. The Oregon statutory scheme, however, is not, of course, as odd as Petitioner Oregon contends.

at 1120, App. to Pet. for Cert. at 40-41. Nowhere, that is, does Oregon law forbid the defendant at the penalty phase of a capital trial to present testimony, such as that of Mr. Guzek's mother, which demonstrates any of the following:

- that the evidence of the crime in its entirety is insufficient to provide a moral justification for the death penalty (*see* pp. 19-28, *ante*);
- that the defendant was not present at the time of the events on which the state relies to show that the killings were "deliberate" and not simply "intentional" (*see* pp. 28-39, *ante*);
- that when compared to the actions of codefendants, who were spared the death penalty, the defendant's actions do not warrant that penalty (*see* pp. 33-35, *ante*); and
- that, particularly in conjunction with admissible post-guilt-phase statements by codefendants strongly suggesting that they lied at the original trial, their *penalty-phase* testimony offered against the defendant to show his whereabouts, actions, deliberation, culpability, and comparative culpability is not to be believed (*see* pp. 29-34, *ante*).

There being multiple reasons why the mother's testimony was "relevant and subject to consideration in the penalty phase," the trial court's exclusion of the testimony violated the federal Constitution as well as state law.

It bears further mentioning that a long line of Oregon Supreme Court cases construing the "fourth question" – asking jurors "[w]hether the defendant should receive a

death sentence," Or. Rev. Stat. § 163.150(1)(b)(D) – holds that this issue is not "subject to proof in the traditional sense," because "it frames a discretionary determination for the jury." *Wagner*, *supra*, p. 24, *post*, 309 Or. at 25, 786 P.2d at 100. Rather, the fourth question asks "the jury, in making its finding, to consider any mitigating aspect of defendant's life, alone or in combination, *not necessarily related causally to the offense*." *Id.*, 309 Or. at 20, 786 P.2d at 101 (emphasis added). The fourth question "does no more than to provide the sentencing jury with the *data* traditionally available to the sentencing judge under the discretionary sentencing model for criminal cases." *Id.*, 309 Or. at 20 (emphasis added).

In interpreting the breadth of "mitigating data" admissible under Oregon law, the Oregon Supreme Court has held it to be reversible error to exclude the opinion testimony of a defendant's wife regarding the likely impact of his execution upon their nine-year-old child. *State v. Stevens*, *supra*, 319 Or. at 583-84, 879 P.2d at 167. The court reasoned that although the wife's opinion was not direct evidence of defendant's character, it was circumstantial evidence from which the jury could infer positive aspects of defendant's character militating against death. *Id.*

But the court has not limited the range of "mitigating data" permitted by the fourth question to "evidence" in its traditional sense. In *State v. Rogers*, 330 Or. 282, 4 P.3d 1261 (2000), the court held that the Oregon Constitution entitles a capital defendant to allocute to the sentencing jury without being under oath or subjected to cross-examination, extending to such proceedings a state constitutional right which had always applied to Oregon non-capital defendants.

In *Rogers*, the Oregon Supreme Court found reversible error mandating vacation of a death sentence where the defendant had proposed to, during his allocution to the sentencing jury, face the judge and ask that if the jury spared his life, the court run all life sentences imposed for the murders of which he had been convicted, consecutively to each other and to a life sentence with 30-year minimum he already was serving. The trial court struck the proposed statement to the judge from Rogers' jury allocution and the Oregon Supreme Court – *after holding that no Eighth or Fourteenth Amendment rights were implicated or violated by the trial judge's actions* – reversed, holding that Rogers' proposed mid-allocution statement to the judge was "an aspect of his character" which the jury was entitled as a matter of state law to consider under the fourth question in determining whether to impose a death sentence:

> A primary traditional purpose for allocution is to allow a criminal defendant to plead for leniency *or to establish mitigation* . . . By informing the jury that he already would be in prison for many years, defendant was attempting to communicate a relevant mitigating consideration, *viz.*, the fact that he already was separated from the community for his conduct, and would continue to be for at least 30 years . . . [The stricken language] invited the judge to impose consecutive life sentences but conditioned that request on the jury's acceptance of defendant's plea that it spare his life. Defendant sought to express that statement to the judge, but also in the jury's presence and for its benefit. *The question whether a defendant might qualify for any sentence less than death is one that ORS 163.150*[ ] *requires the jury to decide. By making the statement in question, defendant*

> *sought to demonstrate to the jury that a facet of his character – his willingness to accept lifetime imprisonment – should induce them to decline to sentence him to death* . . . [U]nder Oregon's death-penalty sentencing scheme, the jury is a participant in the sentencing decision. We conclude that both excluded sentences fell within the proper scope of allocution and that the court violated Article I, section 11, of the Oregon Constitution, in striking them from defendant's proposed unsworn statement.[26]

Rogers, 330 Or. at 307-08, 4 P.3d at 1276 (emphasis added).

Under Oregon law, an allocution is not "evidence." The *Rogers* decision thus stands for the proposition that solely as a matter of state law, aspects of an Oregon capital defendant's character calling for a sentence of less than death need not necessarily be shown by traditional evidentiary methods. Petitioner Oregon here asks this Court not merely to sanction violation of Mr. Guzek's federal constitutional rights to impeach and rebut the state's evidence presented in favor of death, but to revise Oregon's state statutory and constitutional law in the process.

Here, Mr. Guzek requested nothing approaching such non-traditional a method of demonstrating that a death sentence was not appropriate as did the capital defendant, pursuant to state law, in *Rogers*. Rather, Mr. Guzek merely sought to exercise his statutory right to introduce traditional forms of evidence that are *per se* admissible under

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[26] Or. Const. Art. I, § 11, provides, in part: "In all criminal prosecutions, the accused shall have the right * * * to be heard by himself and counsel[.]"

Oregon's capital sentencing scheme. Petitioner's attempt to characterize the evidence at issue as "irrelevant" by virtue of being "residual doubt" evidence is specious.

CONCLUSION

This Court should dismiss the writ of certiorari as improvidently granted due to a want of jurisdiction. In the alternative, this Court should either certify a question to the Oregon Supreme Court to clarify whether mother's 'alibi evidence' is admissible in the upcoming trial under Or. Rev. Stat. § 138.012 independently of any federal constitutional ground, or remand the case to the Oregon Supreme Court for clarification of its *ratio decidendi*. If the Court can do so without rendering an unconstitutional advisory opinion, it should affirm the Oregon Supreme Court judgment because that ruling is compelled by Mr. Guzek's rights under the Sixth, Eighth and Fourteenth Amendments to "meet the state's case" by responding to, rebutting and impeaching prosecution evidence offered in support of a death sentence.

Respectfully submitted,

J. KEVIN HUNT
Of Counsel for Respondent

RICHARD L. WOLF*
Of Counsel for Respondent

**Counsel of Record*

Excerpt of Petitioner's brief below responding to Mr. Guzek's claim that the alibi evidence was improperly excluded, at page 160:

> * * * Mrs. Wilson would have testified that her husband had told her that the aggravated murder at issue in this case was basically a burglary "gone bad."[48]

The trial court excluded all of the evidence referred to above, apparently on the ground argued by the prosecutor that the evidence was all hearsay not within any exception. (10/27/97 Tr 77-78; 103).

2. The proffered testimony was correctly excluded as hearsay or as irrelevant.

The excluded testimony falls into two general categories: alibi evidence and evidence that is inconsistent with Wilson's and Cathey's transcript testimony. The alibi evidence was irrelevant. The sole issue in the penalty phase of an aggravated murder trial is what sentence the defendant shall receive. *See, e.g., Montz*, 309 Or at 604 ("The penalty phase does not redetermine guilt; it determines only the appropriate sentence."). Alibi evidence, although potentially relevant to the guilt phase of an aggravated murder trial, simply has nothing to do with sentencing considerations. Because, at the time of the penalty phase, it has been established as a matter of law that defendant committed the crime, evidence that he

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[48] In addition, defendant filed a pretrial "Notice of Intent to Rely on Evidence of Alibi as Mitigating Evidence." That notice referred to the previous testimony of defendant's grandfather, Clarence Guzek, and his mother, Kathleen Guzek. Both proffers had to do with alibi evidence.

could not have done so is not relevant. Evidence of alibi was correctly excluded.

* * *

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

OREGON *v.* GUZEK

CERTIORARI TO THE SUPREME COURT OF OREGON

No. 04–928. Argued December 7, 2005—Decided February 22, 2006

At the guilt phase of respondent Guzek's capital murder trial, his mother was one of two witnesses who testified that he had been with her on the night the crime was committed. He was convicted and sentenced to death. Twice, the Oregon Supreme Court vacated the sentence and ordered new sentencing proceedings, but each time Guzek was again sentenced to death. Upon vacating his sentence for a third time, the State Supreme Court held that the Eighth and Fourteenth Amendments provide Guzek a federal constitutional right to introduce live alibi testimony from his mother at the upcoming resentencing proceeding. After this Court granted certiorari, Guzek filed a motion to dismiss the writ as improvidently granted.

Held:

1. Guzek's motion to dismiss certiorari is denied. This Court does not lack jurisdiction on the ground that, irrespective of federal law, state law gives Guzek the right to introduce his mother's live testimony. The Court possesses jurisdiction to review state-court determinations that rest upon federal law, 28 U. S. C. §1257(a), and the Oregon Supreme Court based its legal conclusion in relevant part on such law. It pointed out that relevant mitigating evidence under state law refers only to evidence that the Federal Constitution grants a defendant the right to present. And it interpreted the federal admissibility requirement in *Lockett* v. *Ohio*, 438 U. S. 586, 604 (plurality opinion), and *Green* v. *Georgia*, 442 U. S. 95 *(per curiam)*, to include evidence like the proffered alibi testimony. Nor is this Court willing to dismiss the writ on the ground that irrespective of federal law and of the State Supreme Court's federal holding, Oregon's capital-case resentencing statute gives Guzek the right to introduce witnesses who testified at the guilt phase. At most, state law *might* give him such a right, but "a *possible* adequate and independent state

ground" for a decision does not "bar . . . reaching the federal questions" where, as here, the State Supreme Court's decision "quite clearly rested . . . solely on the Federal Constitution." *California* v. *Ramos*, 463 U. S. 992, 997, n. 7. Pp. 2–5.

2. The Constitution does not prohibit a State from limiting the innocence-related evidence a capital defendant can introduce at a sentencing proceeding to the evidence introduced at the original trial. This Court's cases have *not* interpreted the Eighth Amendment as providing such a defendant the right to introduce at sentencing evidence designed to cast "residual doubt" on his guilt of the basic crime of conviction. *Franklin* v. *Lynaugh*, 487 U. S. 164, 173, n. 6 (plurality opinion). *Lockett* v. *Ohio*, *supra*, and *Green* v. *Georgia*, *supra*, distinguished. Even if such a right existed, it could not extend so far as to provide Guzek with a right to introduce the evidence at issue. The Eighth Amendment insists upon "'reliability in the determination that death is the appropriate punishment in a specific case,'" *Penry* v. *Lynaugh*, 492 U. S. 302, 328, and that a sentencing jury be able "to consider and give effect to mitigating evidence" about the defendant's "character or record or the circumstances of the offense," *id.*, at 327–328, but it does not deprive the State of its authority to set reasonable limits on the evidence a defendant can submit, and to control the manner in which it is submitted. Three circumstances, taken together, show that the State has the authority to regulate Guzek's evidence through exclusion. First, sentencing traditionally concerns *how*, not *whether*, a defendant committed the crime, but alibi evidence concerns only *whether*, not *how*, he did so. Second, the parties previously litigated the issue to which the evidence is relevant. Thus, the evidence attacks a previously determined matter in a proceeding at which, in principle, that matter is not at issue. The law typically discourages such collateral attacks. Cf. *Allen* v. *McCurry*, 449 U. S. 90, 94. Third, the negative impact of a rule restricting Guzek's ability to introduce *new* alibi evidence is minimized by the fact that Oregon law gives the defendant the right to present to the sentencing jury *all* the innocence evidence from the original trial (albeit through transcripts). The Oregon courts are free to consider on remand whether Guzek is entitled to introduce his mother's testimony to impeach other witnesses whose earlier testimony the government intends to introduce at resentencing. Pp. 5–9.

336 Ore. 424, 86 P. 3d 1106, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, KENNEDY, SOUTER, and GINSBURG, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined. ALITO, J., took no part in the consideration or decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 04–928

OREGON, PETITIONER *v.* RANDY LEE GUZEK

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

[February 22, 2006]

JUSTICE BREYER delivered the opinion of the Court.

Respondent Randy Lee Guzek was found guilty of capital murder and sentenced to death. On appeal, the Oregon Supreme Court affirmed the conviction but vacated the sentence and ordered a new sentencing proceeding. The question before the Court is whether the State may limit the innocence-related evidence he can introduce at that proceeding to the evidence he introduced at his original trial. We hold that the limitation does not violate the Constitution.

I

Oregon tried Guzek for the offense of capital murder. The evidence showed that Guzek and two associates decided to burglarize the Houser family home, that they entered the house, that an associate killed Rod Houser, and that Guzek then robbed and killed Lois Houser. After the police learned that Guzek held a special grudge against the Housers, they traced him and his associates. The associates confessed. And they testified at trial, painting Guzek as the ringleader.

Guzek's defense rested in part upon an alibi. He presented two alibi witnesses, his grandfather and his

mother, who testified that Guzek had been with the one or the other at the time of the crime. The jury disbelieved the alibi, it convicted Guzek, and it sentenced him to death.

Guzek appealed; the Oregon Supreme Court affirmed the conviction; but the court ordered a new sentencing proceeding. Guzek was again sentenced to death; he again appealed; and the Oregon Supreme Court again ordered resentencing. Guzek was sentenced to death for the third time; he again appealed; and yet again the Oregon Supreme Court found the sentencing procedures faulty. Seeking to avoid further errors at the next (the fourth) sentencing proceeding, the Oregon Supreme Court also addressed the admissibility of certain evidence Guzek seeks to introduce at that proceeding, including live testimony from his mother about his alibi.

The Oregon Supreme Court held that the Eighth and Fourteenth Amendments provide Guzek a federal constitutional right to introduce this evidence at his upcoming sentencing proceeding. At Oregon's request, we agreed to review that determination. 544 U. S. ___ (2005).

II

Before turning to the merits of Oregon's claim, we consider a motion that Guzek made, asking us to dismiss the writ of certiorari as improvidently granted. The motion rests upon Guzek's claim that, irrespective of federal law, *state* law gives him the right to introduce his mother's live testimony—the additional alibi evidence here at issue. See Ore. Rev. Stat. §138.012(2)(b) (2003). For this reason, he says, the Court lacks jurisdiction to hear this appeal, or, at the least, there is no good practical reason for us to decide the federal issue.

We cannot agree, however, that we lack jurisdiction to hear the case. We possess jurisdiction to review state-court determinations that rest upon federal law. 28

U. S. C. §1257(a). And the Oregon Supreme Court here based its legal conclusion in relevant part on federal law. The court pointed out that *state* law permits the introduction (at a new sentencing hearing) of "'evidence . . . *relevant* to [the] sentence including . . . mitigating evidence *relevant* to . . . [w]hether the defendant should receive a death sentence.'" App. to Pet. for Cert. 45 (quoting Ore. Rev. Stat. §§163.150(1)(a), (b) (2003); emphasis added and deleted). But it immediately added that the state law's words "relevant . . . mitigating evidence" refer (in the present context) only to evidence that the *Federal Constitution* grants a defendant the right to present. App. to Pet. for Cert. 45–52.

The Oregon court went on to discuss this Court's statements to the effect that the Eighth and Fourteenth Amendments "'require that the sentencer . . . not be precluded from considering, as a mitigating factor . . . any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *Id.*, at 54 (quoting *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion); emphasis deleted); cf. App. to Pet. for Cert. 56 (recognizing that this aspect of *Lockett* was adopted by a majority of the Court in *Eddings* v. *Oklahoma*, 455 U. S. 104, 110 (1982)). And the Oregon court then interpreted this Court's holding in *Green* v. *Georgia*, 442 U. S. 95 (1979) *(per curiam)*, as including, within that federal admissibility requirement, evidence which, like the proffered alibi testimony, tends to show that the defendant did not commit the crime for which he has been convicted. Thus, it held that state law demanded "admissibility" solely for a federal reason. And we possess jurisdiction. See, *e.g.*, *South Dakota* v. *Neville*, 459 U. S. 553, 556, n. 5 (1983); *Delaware* v. *Prouse*, 440 U. S. 648, 651–653 (1979).

Neither are we persuaded by Guzek's argument that we should dismiss the case because irrespective of federal law and irrespective of the Oregon Supreme Court's federal

holding, Oregon law gives him the right to introduce witnesses who testified at the guilt phase; and his mother was such a witness (a fact, he says, that the Oregon Supreme Court overlooked). Guzek points in support to an Oregon capital-case resentencing statute that says,

> "[a] transcript of all testimony and all exhibits and other evidence properly admitted in the prior trial . . . are admissible in the new sentencing proceeding." Ore. Rev. Stat. §138.012(2)(b) (2003).

The provision adds that,

> "[e]ither party may recall any witness who testified at the prior trial . . . and may present additional relevant evidence." *Ibid.*

We do not doubt that these provisions give Guzek the state–law right to introduce a *transcript* of guilt-phase testimony. App. to Pet. for Cert. 43 (authorizing introduction of transcript of Guzek's grandfather's alibi testimony). But Guzek wishes to do more than introduce a *transcript* of his mother's alibi evidence; he wishes to call his mother to the stand as a live witness and elicit *additional* alibi testimony. Tr. of Oral Arg. 37–39, 41, 55–56. The Oregon statute quoted above does not expressly say whether he may do so. It does give him the right to "recall any witness" who testified at the first trial and to "present additional *relevant* evidence." (Emphasis added.) But is this additional evidence "relevant"? The Oregon Supreme Court thought so, but only because *federal* law insists upon its relevance. And its opinion suggests that, in the absence of federal compulsion, it would not fall within the scope of the state statutory word "relevant." See *supra*, at 3.

At most, Guzek has shown that state law *might*, not that it *does*, independently give him the right to introduce this evidence. We have made clear that "a *possible* adequate and independent state ground" for a decision does not "bar

[our] reaching the federal questions" where, as here, a "State Supreme Court quite clearly rested its [decision] solely on the Federal Constitution." *California* v. *Ramos*, 463 U. S. 992, 997, n. 7 (1983); see also *City of Revere* v. *Massachusetts Gen. Hospital*, 463 U. S. 239, 242 (1983); *United Air Lines, Inc.* v. *Mahin*, 410 U. S. 623, 630–631 (1973). And we consequently deny the motion to dismiss the writ.

III

As our discussion in Part II, *supra*, makes clear, the federal question before us is a narrow one. Do the Eighth and Fourteenth Amendments grant Guzek a constitutional right to present evidence of the kind he seeks to introduce, namely *new* evidence that shows he was not present at the scene of the crime. That evidence is *inconsistent* with Guzek's prior conviction. It sheds no light on *the manner* in which he committed the crime for which he has been convicted. Nor is it evidence that Guzek contends was unavailable to him at the time of the original trial. And, to the extent it is evidence he introduced at that time, he is free to introduce it now, albeit in transcript form. Ore. Rev. Stat. §138.012(2)(b) (2003). We can find nothing in the Eighth or Fourteenth Amendments that provides a capital defendant a right to introduce new evidence of this kind at sentencing.

We cannot agree with the Oregon Supreme Court that our previous cases have found in the Eighth Amendment a constitutional right broad enough to encompass the evidence here at issue. In *Lockett* v. *Ohio*, *supra*, a plurality of this Court decided that a defendant convicted of acting in concert with others to rob and to kill could introduce at the sentencing stage evidence that she had played a minor role in the crime, indeed, that she had remained outside the shop (where the killing took place) at the time of the crime. A plurality of the Court wrote that,

> "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and *any of the circumstances of the offense that the defendant proffers* as a basis for a sentence less than death." *Id.*, at 604 (emphasis added and deleted).

And in *Eddings* v. *Oklahoma*, 455 U. S. 104, the Court majority adopted this statement. See also *McCleskey* v. *Kemp*, 481 U. S. 279, 306 (1987); *Bell* v. *Ohio*, 438 U. S. 637, 642 (1978) (plurality opinion).

But the evidence at issue in these cases was traditional sentence-related evidence, evidence that tended to show *how*, not *whether*, the defendant committed the crime. Nor was the evidence directly inconsistent with the jury's finding of guilt.

The Oregon Supreme Court thought that this latter distinction—the fact that the "alibi evidence was inconsistent with," rather than "consistent with[,] the underlying convictions"—did not matter. App. to Pet. for Cert. 58. It said that this "factual distinction . . . is of no consequence in light of the Supreme Court's decision in *Green v. Georgia*." *Ibid.* In *Green*, however, the Court focused upon a defendant convicted of murder, who sought to introduce at sentencing a statement his confederate made to a third party that he (the confederate) had alone committed the murder (*i.e.*, without the defendant). The State opposed its use at the defendant's sentencing hearing *on the ground that, as to the defendant, it was hearsay.* The Court, in a brief *per curiam* opinion, noted that the State had used the confession in the confederate's trial, referred to an earlier case holding that the Constitution forbids States from "'mechanistically'" applying the hearsay rule "'to defeat the ends of justice,'" and held that the Constitution prohibited the State from barring use of the confes-

sion. 442 U. S., at 97 (quoting *Chambers* v. *Mississippi*, 410 U. S. 284, 302 (1973)). The opinion focused only upon the hearsay problem, and it implicitly assumed that, in the absence of the hearsay problem, *state* law would not have blocked admission of the evidence.

In any event, subsequent to *Green*, this Court decided *Franklin* v. *Lynaugh*, 487 U. S. 164 (1988) (plurality opinion), and that case makes clear, contrary to the Oregon Supreme Court's understanding, that this Court's previous cases had *not* interpreted the Eighth Amendment as providing a capital defendant the right to introduce at sentencing evidence designed to cast "residual doubt" on his guilt of the basic crime of conviction. The *Franklin* plurality said it was "quite doubtful" that any such right existed. *Id.*, at 173, n. 6. And two other Members of the Court added that "[o]ur cases" do not support any such "right to reconsideration by the sentencing body of lingering doubts about . . . guilt." *Id.*, at 187 (O'Connor, J., concurring in judgment). See also *Penry* v. *Lynaugh*, 492 U. S. 302, 320 (1989) (characterizing *Franklin* as a case in which a majority "agreed that 'residual doubt' as to Franklin's guilt was not a constitutionally mandated mitigating factor" (brackets omitted)).

Franklin did not resolve whether the Eighth Amendment affords capital defendants such a right, for the plurality held that the sentencing scheme at issue was constitutional "even if such a right existed." 487 U. S., at 174. But the Court's statements on the matter make clear that the Oregon Supreme Court erred in interpreting *Green* as providing a capital defendant with a constitutional right to introduce residual doubt evidence at sentencing.

In this case, we once again face a situation where we need not resolve whether such a right exists, for, even if it does, it could not extend so far as to provide this defendant with a right to introduce the evidence at issue. See, *e.g.*, *Alabama State Federation of Labor* v. *McAdory*, 325 U. S.

450, 461–462 (1945). The Eighth Amendment insists upon "'reliability in the determination that death is the appropriate punishment in a specific case.'" *Penry, supra,* at 328 (quoting *Woodson* v. *North Carolina,* 428 U. S. 280, 305 (1976) (plurality opinion)). The Eighth Amendment also insists that a sentencing jury be able "to consider and give effect to mitigating evidence" about the defendant's "character or record or the circumstances of the offense." *Penry, supra,* at 327–328. But the Eighth Amendment does not deprive the State of its authority to set reasonable limits upon the evidence a defendant can submit, and to control the manner in which it is submitted. Rather, "States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'" *Boyde* v. *California,* 494 U. S. 370, 377 (1990) (quoting *Franklin, supra,* at 181 (plurality opinion)); see, *e.g., Johnson* v. *Texas,* 509 U. S. 350, 362 (1993); *California* v. *Brown,* 479 U. S. 538, 543 (1987).

Three circumstances, taken together, convince us that the State possesses the authority to regulate, through exclusion, the evidence that Guzek seeks to present. First, sentencing traditionally concerns *how,* not *whether,* a defendant committed the crime. See United States Sentencing Commission, Guidelines Manual §1A1.1, editorial note, §4(a), p. 4 (Nov. 2004). But the evidence at issue here—alibi evidence—concerns only *whether,* not *how,* he did so.

Second, the parties previously litigated the issue to which the evidence is relevant—whether the defendant committed the basic crime. The evidence thereby attacks a previously determined matter in a proceeding at which, in principle, that matter is not at issue. The law typically discourages collateral attacks of this kind. Cf. *Allen* v. *McCurry,* 449 U. S. 90, 94 (1980) ("As this Court and other courts have often recognized, res judicata and collateral

estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication").

Third, the negative impact of a rule restricting defendant's ability to introduce *new* alibi evidence is minimized by the fact that Oregon law gives the defendant the right to present to the sentencing jury *all* the evidence of innocence from the original trial regardless. That law permits the defendant to introduce at resentencing transcripts and exhibits from his prior trial. Ore. Rev. Stat. §138.012(2)(b) (2003). The defendant here has not claimed that the evidence at issue was unavailable at the time of his original trial. Thus, he need only have introduced it at that time to guarantee its presentation (albeit through transcripts) to a resentencing jury as well.

The legitimacy of these trial management and evidentiary considerations, along with the typically minimal adverse impact that a restriction would have on a defendant's ability to present his alibi claim at resentencing convinces us that the Eighth Amendment does not protect defendant's right to present the evidence at issue here. We conclude that the Oregon court was wrong in holding to the contrary.

IV

Guzek also contends that, even if the Eighth and Fourteenth Amendments do not mandate the admission of his mother's testimony, he is entitled to introduce that evidence to impeach his associates, whose earlier testimony the government intends to introduce at resentencing. The Oregon Supreme Court did not address this issue; nor do we believe it fairly encompassed within the question presented. The Oregon courts are free to consider it on remand should they believe it appropriate to do so.

V

For these reasons, we vacate the judgment of the Oregon Supreme Court, and we remand the case for proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE ALITO took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 04–928

OREGON, PETITIONER *v.* RANDY LEE GUZEK

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

[February 22, 2006]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in the judgment.

In this case we have the opportunity to put to rest, once for all, the mistaken notion that the Eighth Amendment requires that a convicted capital defendant be given the opportunity, at his sentencing hearing, to present evidence and argument concerning residual doubts about his guilt. Although the Court correctly holds that there is no Eighth Amendment violation in this case, I would follow the Court's logic to its natural conclusion and reject all Eighth Amendment residual-doubt claims.

I agree with the Court that we have jurisdiction and should exercise it in this case. What requires me to withhold agreement to the Court's opinion is the last of the "[t]hree circumstances" on which it relies, *ante*, at 8–9—namely, "the fact that Oregon law gives the defendant the right to present to the sentencing jury *all* the evidence of innocence from the original trial." *Ante*, at 9 (emphasis in original). The first two of the circumstances are alone sufficient to dispose of the claim that the Eighth Amendment guarantees a capital defendant a *second* opportunity, at sentencing, to litigate his innocence. In fact, the Court's third "circumstance" is an analytical misfit in the company of the other two. The first two—that "sentencing traditionally concerns *how*, not *whether*, a defendant committed the crime," *ante*, at 8, and that "the parties

previously litigated the issue to which the evidence is relevant," *ibid.*—show that compelling the admission of innocence-related evidence would be *improper* and *unnecessary* at a sentencing hearing. The third, by contrast, suggests that there is no constitutional violation in this case because *enough* of such evidence may be admitted on remand. The latter factor would be relevant only if the former two were not.

If we needed any third factor to justify our holding, a better candidate would be that the claim we consider here finds no support in our Nation's legal history and traditions. In 1986, Justice Marshall correctly observed that there had been "few times in which any legitimacy has been given to the power of a convicted capital defendant facing the possibility of a death sentence to argue as a mitigating factor the chance that he might be innocent." *Lockhart* v. *McCree*, 476 U. S. 162, 205 (dissenting opinion). Nothing has changed on that score in the last 20 years. On the contrary, in *Franklin* v. *Lynaugh*, 487 U. S. 164 (1988), four Members of this Court noted that our "prior decisions . . . fail to recognize a constitutional right to have such doubts considered as a mitigating factor," *id.*, at 174 (plurality opinion). They were, moreover, "quite doubtful" that the purported right existed, because it is "arguably inconsistent with the common practice of allowing penalty-only trials on remand of cases where a death sentence—but not the underlying conviction—is struck down on appeal." *Id.*, at 173, n. 6. Two other Members of the Court would have rejected the claim outright. *Id.*, at 187 (O'Connor, J., concurring in judgment).

After *Franklin*, the lower courts have unanimously denied constitutional claims like the one we consider today. See, *e.g.*, *Ziegler* v. *Crosby*, 345 F. 3d 1300, 1310 (CA11 2003); *Evans* v. *Thompson*, 881 F. 2d 117, 121 (CA4 1989); *Duest* v. *State*, 855 So. 2d 33, 40–41 (Fla. 2003); *Commonwealth* v. *Fisher*, 572 Pa. 105, 115–116, 813 A. 2d

761, 767 (2002); *People* v. *Emerson*, 189 Ill. 2d 436, 501–504, 727 N. E. 2d 302, 338–339 (2000); *State* v. *Fletcher*, 354 N. C. 455, 470–472, 555 S. E. 2d 534, 544 (2001); *Melson* v. *State*, 775 So. 2d 857, 898–899 (Ala. Crim. App. 1999). The last apparent scrap of authority for the contrary view came from our cryptic opinion in *Green* v. *Georgia*, 442 U. S. 95 (1979) *(per curiam)*, on which the Oregon Supreme Court principally relied. See App. to Pet. for Cert. 58–62. The chief virtue of today's opinion lies in its discarding the notion that *Green* provides any support for an Eighth Amendment right to argue residual doubt at sentencing. See *ante*, at 6–7.

In mentioning, however, the superfluous circumstance that Oregon law happens to provide for the admission at sentencing of *some* evidence that relates to innocence, the Court risks creating doubt where none should exist. Capital defendants might now be tempted to argue that the *amount* of residual-doubt evidence carried over from the guilt phase in their sentencing hearings is insufficient to satisfy the Court's third factor. Every one of these "residual-doubt" claims will be meritless in light of the Court's first two factors. We should make this perfectly clear today.